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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 338

**WELWEL WARSZOWER, ALIAS "ROBERT WIL-
LIAM WIENER", ETC., PETITIONER,**

vs.

THE UNITED STATES OF AMERICA

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT**

PETITION FOR CERTIORARI FILED AUGUST 14, 1940.

CERTIORARI GRANTED OCTOBER 14, 1940.

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OF APPEALS FOR THE SECOND CIRCUIT

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[fol. 1]

**IN UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT**

UNITED STATES OF AMERICA, Appellee,
against

WELWEL WARSZOWER, Defendant-Appellant

STATEMENT UNDER RULE 13

The indictment in this case (C 106-291) was filed on December 4, 1939. The indictment is in one count. It charges a violation of section 220 of Title 22 of the United States Code. On December 4, 1939, the defendant pleaded not guilty. Bail in the sum of \$10,000 was set and was furnished on that date. The case came on for trial before Hon. John C. Knox, United States District Judge, and a jury, in the Southern District of New York, on February 8, 1940. The trial continued up to and concluded on February 15, 1940, when a verdict of guilty was returned. On February 20, 1940, the defendant was sentenced to a term of two years imprisonment in a penitentiary to be designated by the Attorney General. Judgment was entered on the day of sentence. At the time of sentence Judge Knox stayed its execution pending an application to the Circuit Court of Appeals for bail pending appeal. On February 23, 1940, notice of appeal was filed. On March 13, 1940, the Circuit Court of Appeals granted a motion made by the defendant for bail pending the outcome of this appeal, and fixed the same amount of bail, namely, \$10,000.

[fol. 2] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

C 106-291

THE UNITED STATES

vs.

WELWEL WARSZOWER, Alias ROBERT WILLIAM WIENER Alias
William Wiener Alias A. Blake Alias A. Benson

DOCKET ENTRIES

For U. S.: Unlawfully using a passport obtained by false statements in the applications therefor.

Dec. 4, 1939. Filed Indictment.

Dec. 4, 1939. Defendant Pleads Not Guilty—Bail \$10,000—Remanded. Trial adjourned to Dec. 26, 1939. Hulbert, J.

Dec. 4, 1939. Filed Notice of Appearance, Sol H. Cohen, attorney.

Dec. 13, 1939. Filed remand dated Dec. 4, 1939.

Feb. 8, 1940. Trial begun before Knox, J.

Feb. 9, 1940. Trial continued.

Feb. 13, 1940. Trial continued.

[fol. 3] Feb. 14, 1940. Trial continued. Government rests. Motion for a directed verdict of acquittal—Denied. Exception. Motion to dismiss indictment—Denied. Exception.

Feb. 15, 1940. Trial continued—Defendant rests. Both sides rest. Defendant renews motions made at close of Government's case. Denied. Exception—Summations and charge. Jury retires. Alternates discharged. Verdict—Guilty. On motion of defendant, jury polled. Motion to set aside verdict and for a new trial—Denied. Exception. Sentence adjourned to Feb. 20, 1940, at 10:30 A. M.—Bail continued. Knox, J.

Feb. 20, 1940. Welwel Warszower renews motion to set aside the verdict—Denied exception.

Feb. 20, 1940. Filed Judgment. Sentenced to two years in a penitentiary designated by the Attorney General. Execution of sentence stayed one week. Bail continued to Feb. 27, 1940. Knox, J. Court recommends defendant be deported at expiration of prison sentence. Knox, J.

Feb. 20, 1940. Issued Commitment and copies. Knox, J.

Feb. 23, 1940. Filed notice and grounds of appeal—\$5.

Feb. 26, 1940. Filed order continuing defendant on bail until determination of application for bail pending appeal is made to Circuit Court of Appeals. Knox, J.

[fol. 4] IN UNITED STATES DISTRICT COURT

INDICTMENT

SOUTHERN DISTRICT OF NEW YORK, ss:

The Grand Jurors for the United States of America, duly empaneled and sworn in the District Court of the United States for the Southern District of New York, inquiring for that District upon their oath present;

That heretofore, to wit, on or about the 30th day of September, 1937, at the Southern District of New York and within the jurisdiction of this Court, Wekwel Warszower, alias "Robert William Wiener", alias "William Wiener", alias "A. Blake", alias "A. Benson", the defendant herein, unlawfully, wilfully and knowingly, for the purpose of entering the United States, used and attempted to use a passport issued under the authority of the United States, the issue of which he secured by reason of false statements which he made in the application therefor; that is to say, at the time and place aforesaid, the defendant herein did unlawfully, wilfully and knowingly use and attempt to use passport No. 332207, issued on or about July 21, 1936, in the name of "Robert William Wiener", which said passport the defendant herein had obtained and secured by reason of false statements made in the application therefor, which said application was executed by him at a passport agency of the Department of State of New York City, New York, on or about July 18, 1936, in the name of "Robert William Wiener", in which said passport application, executed on or about July 18, 1936, as aforesaid, the defendant herein falsely stated in substance and effect (1) that his name was "Robert William Wiener", (2) that he was "a citizen of the United [fol. 5] States", (3) that he was born "at Atlantic City, N. J., U. S. A., on Sept. 5th, 1896" and (4) that he had not resided outside the United States, whereas in truth and in fact, as the defendant herein then and there well knew, (1) that his name was not "Robert William Wiener", (2) he was not a citizen of the United States, (3) he was not born in Atlantic City, N. J., U. S. A. on Sept. 5th, 1896 and (4) he had resided outside the United States, which said passport No. 332207, issued on or about July 21, 1936, in the name of "Robert William Wiener", issued on the said application as aforesaid, the defendant herein did use and present to an Inspector of the United States Immigration and Naturalization Service at the Port and City of New York, within the Southern District of New York and within the jurisdiction of this Court on or about the 30th day of September, 1937, to gain and secure entry and admission into the United States; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Title 22, Section 220, United States Code.)

John T. Cahill, United States Attorney.

[fol. 6] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

C 106-291

UNITED STATES OF AMERICA

VS.

WELWEL WARSZOWER

Before Hon. John C. Knox, D. J., and a Jury

Bill of Exceptions

New York, February 8, 1940, 10.30 a. m.

APPEARANCES:

John T. Cahill, Esq., United States Attorney, for the Government; Lester C. Dunigan, Esq., and Robert L. Werner, Esq., Assistant United States Attorneys, Ashley J. Nicholas, Esq., Special Assistant to the United States Attorney.

Stanley Fowler, Esq., and Edward I. Aronow, Esq., Attorneys for Defendant.

A jury was duly impaneled and sworn.

(Recess until 2:15 P. M.)

(Mr. Werner opened to the jury in behalf of the Government.)

(Mr. Fowler opened to the jury in behalf of the Defendant.)

[fol. 7] Afternoon Session

CHARLES SIEGEL, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination.

By Mr. Werner:

Q. What is your occupation?

A. Chief of the passport section of the Division of Communication and Records of the State Department.

Q. How long have you held that position?

A. About 11 years.

Q. Just what is your work in connection with that position?

A. The section under my supervision records and directs research in connection with the forms of applications and correspondence pertaining to American citizenship and passports.

Q. Are all passport files under your supervision?

A. From 1906 to the present time.

Q. How are passport applications filed, Mr. Siegel?

A. There are two distinct subdivisions; one category is filed in volumes and another is filed in a flat file.

Q. When did the flat file system come into use?

A. April 1st, 1935.

Q. And that is in use at the present time?

A. Yes, sir.

Q. And prior to that time they were filed in volumes?

A. Yes, sir.

(Paper marked Government's Exhibit 1 for identification.)

Q. I show you Government's Exhibit 1 for identification and ask you if this is a passport application from the files of today?

A. Yes, sir, it is.

Mr. Werner: I offer Government's Exhibit 1 for identification in evidence.

(Government's Exhibit 1 for identification received in evidence.)

[fol. 8] Q. Mr. Siegel, can you state whether or not any other passport application was made to the Department by a person using the name of Robert William Wiener and giving the birth date there given?

A. No, sir, there is no record from 1906 to the present time.

Q. Has an application for an American passport ever been made in the name of Welwel Warszawer born in Atlantic City, New Jersey, September 5, 1896?

A. No, sir, there is no such record.

Q. Is there record of an application of Welwel Warszawer born in Atlantic City, September 5, 1893?

A. No, sir, there is not.

Q. Is there any application in the name of Welwel Warszower?

A. No, sir.

Q. Is there record of an application having been made by William Wiener or William Weiner born September 5, 1896?

A. No, sir.

Q. Any record of a William Wiener, of a Robert Wiener or any variation of the name Wiener or Weiner born in Atlantic City September 5, 1896, or 1897?

A. There is no such record.

Q. Can you state whether or not a passport was issued upon that application?

A. Yes, sir, there is an issue stamp in the upper right-hand corner and the number of the passport.

Q. Has that passport ever been surrendered by the applicant to the Department?

A. There is no evidence of it ever having been returned to the Department.

(No cross-examination.)

[fol. 9] MATTHEW C. EARLE, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination.

By Mr. Werner:

Mr. Werner: May I wait, your Honor, until the jury has finished examining the passport application?

The Court: Very well.

(Papers marked Government's Exhibits 2 and 3 for identification.)

Q. What is your occupation, Mr. Earle?

A. Assistant to the passport agent in New York.

Q. What agency?

A. The Wall Street agency.

Q. How long have you been assigned to the Wall Street agency?

A. I have been there since April 1927.

Q. As an agent of the State Department are you authorized to administer oaths in connection with application for passports and have applications executed before you?

A. I am.

Q. Will you look at Government's Exhibit 1 in evidence and state if you can whether or not that application for passport was executed before you?

A. Yes, this was.

Q. Now approximately how many applications for passports have been executed before you?

A. I cannot say offhand; it runs up into thousands anyhow.

Q. Have you a recollection of each and every application for passport executed before you?

A. No, I do not.

Q. Do you follow a set procedure in each instance with respect to the application for passport?

A. I do.

Q. Are there certain fundamentals of that procedure which you invariably follow?

A. There are.

Q. Looking at that Exhibit 1 in evidence, the application before you, can you state what if anything you said to the applicant and what happened on the day that application [fol. 10] was executed before you?

A. When the application is presented to me the first thing I do is to check the photograph with the applicant to see that it is a good likeness.

Q. How many photographs are submitted?

A. There must be two.

Q. Do you know the purpose of two photographs?

A. One photograph is to attach to the application and the other is kept loose to be attached to the passport. I then check the application to see that it is filled in correctly and completely, and where the applicant has omitted to fill in certain information I ask him and then insert whatever is necessary.

Q. Was there certain information omitted from that application when it was brought to you by the applicant?

A. Yes.

Q. Can you state what information that was?

A. It appears in the space in reference to residence abroad.

Q. There was a blank space there?

A. That was blank when it came to me.

Q. What is your practice when that space is left blank?

A. I ask the applicant if he has ever been abroad before.

Q. Can you state by looking at that application what the applicant answered?

A. He answered he had never been abroad before, because I wrote in here "none."

Q. Did you ask the applicant anything else in connection with that application?

A. I also asked him if he had had a previous passport.

Q. Can you tell what his answer was?

A. He answered in the negative, because I wrote "none" in that space also.

Q. Is there anything else on the front page of the application for passport in your handwriting?

A. Yes, there are my initials on the left side.

Q. And that is after a stamp which says "Birth certificate seen"?

A. Yes.

Q. Can you state what that stamp indicates?

A. That shows that the applicant presented a birth certificate [fol. 11] which was acceptable and we put the stamp on the application showing that a birth certificate was seen.

Q. If a birth certificate is presented to you and it appears to be regular on its face, does the Department make further investigation?

A. What we do is we ordinarily stamp the birth record and return it to the applicant.

Q. Is there any other writing on the face of the passport application by you?

A. Not on the front except—yes, the initials on the receipt of the \$10 fee.

Q. For passport fee \$10?

A. Yes.

Q. Does that indicate that the applicant paid you the \$10?

A. That is right.

Q. Turn over the application, Mr. Earle, and state if you can what if any further conversation you had with the applicant on this occasion.

A. Well, on taking the oath of allegiance—

Q. What do you say to the applicant?

A. I ask him if this is his signature and if he swears to the truth of the statements in the application, and he takes the oath of allegiance at the same time.

Q. Can you state from looking at the application, Exhibit 1, what the applicant said?

A. He answered in the affirmative to all three, because I signed them.

Q. Did anyone else appear with the applicant?

A. Yes, there was.

Q. Can you state who?

A. There was some person, J. C. Lowry, and he signed as a witness.

Q. Can you state what Mr. Lowry's business with you was?

A. He was there as identifying witness and he signed an affidavit to that effect.

Q. What does he swear to in his affidavit?

A. He swears that he is a citizen of the United States, that he resides at the address he gives here and that he knows the applicant who executed the affidavit to be a citizen of the United States, and also that the statements [fol. 12] made by the applicant are true to the best of his knowledge and belief, and also he solemnly swears he has known the applicant personally for nine years.

Q. Is that your signature which appears just above the signature of the applicant and identifying witness?

A. Yes, sir.

Q. And the date July 26, 1936, the date the application was executed before you, is it?

A. That is.

Q. I notice this stamp "New York Pouch," was that stamp put on by you?

A. Yes.

Q. Can you explain that?

A. In the general course of business when an applicant is sailing shortly after application is filed we ordinarily advise having the passport sent to our office for delivery instead of going through the mail, and it was done in this case.

Q. After the application was executed what do you do with it?

A. The application is then forwarded to Washington.

Q. I show you Government's Exhibit 2 for identification and ask you whether by looking at that Exhibit 2 for identification you can say whether or not the passport when issued was returned to your agency.

A. Yes, it was.

Q. Is a record kept of the arrival of passports at the agency from the Department at Washington?

A. Yes, there is.

Q. Is Government's Exhibit 2 for identification such a record?

A. It is.

Mr. Werner: I offer Government's Exhibit 2 for identification is evidence.

(Government's Exhibit 2 for identification received in evidence and shown to the jury.)

Q. Do you know what 7-21-36 on there indicates?

A. That is the list made up by the department July 21st, 1936.

[fol. 13] Q. Does every name on that list represent a passport received at the agency?

A. That is right.

Q. When passports are received at the agency what is the regulation or practice with respect to their delivery to the applicant?

A. The applicant can call in person for the passport or send an authorized agent with a written and signed request authorizing delivery to the bearer of the letter.

Q. If the letter directs delivery are those authorizations kept on file?

A. They are kept in our office as a receipt.

Q. I show you Government's Exhibit 3 for identification and ask you if that is such an authorization?

A. Yes, it is.

Mr. Werner: I offer Government's Exhibit 3 for identification in evidence.

(Government's Exhibit 3 for identification received in evidence and read to the jury.)

Q. Can you state what this stamp "Passport received by me" indicates?

A. When we deliver the passport we stamp that and put the date of delivery on it. And at that time whoever takes the passport signs for it with their name and address.

Cross-examination.

By Mr. Fowler:

Q. On Government's Exhibit 3 there was no part of the passport stamp on that receipt that was signed by the alleged addressee?

A. No, sir, it is not customary to put that on.

Q. I understand you to tell us you take thousands of acknowledgments on these applications for passports.

Before you take the acknowledgment you look through the application to see that it is complete, is that right?

A. That is right.

Q. And you said that if you found that there were any blanks you required of the applicant so that from the information he gave you you could fill in the blanks, is that right?

A. That is right.

Q. Now you take a look at the line, the second line of this—you have the original there?

A. Yes, sir.

Q. Take a look at the second line of the application under the line that says "Atlantic City, N. J., U. S. A., on Sept. 5th, 1896," the application reads on, "that I came to the United States, on or about" and then a blank. Do you see that?

A. Yes, sir.

Q. It is still blank, isn't it?

A. Yes, sir.

Q. And you took the man's acknowledgment to the passport with that blank?

A. Yes, sir.

Q. Now then, go down to the next line and it reads, "that I resided continuously in the United States from" and then there is a blank, and then "to" and then there is a blank.

A. That is right.

Q. Didn't you ask him about that?

A. That is not required.

Q. Did you ask him about those blanks?

A. No, sir.

Q. You left them blank?

A. That is right.

Q. Then you come down on the passport application where it says, "and that I have resided outside the United States as follows."

A. That is right.

Q. Then you say you had some conversation with the man?

A. Right.

Q. And from that conversation you wrote what you now say is the word "none"? Is that right?

A. That is right.

Q. And you wrote that word, did you, on the same day that the passport application was made, namely, July 18, 1936?

A. Yes, sir, I did.

Q. The man Wiener had made this out in your presence?

A. No, sir, he did not.

Q. Do you know that he wrote originally—did you know he placed his handwriting on that Government's Exhibit 1 [fol. 15] on July 18, 1936?

A. All I know about his writing was the signature.

Q. You knew that he signed this before you, is that right?

A. No, sir, I am not saying that. I say he swore to me that that was his signature.

Q. You didn't see him sign it?

A. No, sir.

Q. Look at what you said when you signed your name, "Subscribed and sworn to before me this July 18, 1936."

A. I see that.

Q. That is not so, is it; that is not the fact? It was not subscribed before you?

A. It was not signed before me.

Q. It was not signed or subscribed before you ever?

A. No, sir. It was subscribed before me.

Q. Despite what you said here?

A. That is right.

Q. You wrote your name twice on this, didn't you?

A. Yes, sir.

Q. And you wrote your name those two time- on July 18, 1936; there is no doubt about that?

A. No, sir.

Q. Do you say you wrote this scrawl that you identified as the word "none" at the same time you wrote your name?

A. Yes, sir.

Q. With the same pen?

A. Yes, sir.

Q. With the same ink?

A. Yes, sir.

Q. Now that you cannot be mistaken about?

A. No, sir.

Q. Take a look at that scrawl you identify as "none" and take a look at your signature.

A. Yes, sir.

Q. Do you want to change your testimony at all?

A. No, sir.

Q. They were both, the signatures, both of them, and this scrawl you say is "none" were written by the same pen on the same day by the same man with the same ink?

A. That is right.

Q. Come on down to the next you filled in, "My last American passport was obtained from" and then there are two marks there to fill in those vacancies on the line.

A. Yes, sir.

[fol. 16] Q. There were no marks to fill in the spaces up here after "that I resided continuously in the United States from blank to blank"?

A. No, sir.

Q. But in spite of the marks being down here, "My last American passport was obtained from" and then there is a line drawn there—I will withdraw that.

When a person runs a line across a space in a printed form what does that mean to you?

A. We usually take it that that is ruled out.

Q. That that means "none"?

A. That that is ruled out so far as he is concerned.

Q. That that would mean none?

A. Not necessarily. Maybe he didn't want to fill it in.

Q. You take it that did not apply to him?

A. Maybe he didn't want to fill it in.

Q. In spite of that you put this scrawl that you say here is the word "none"?

A. Yes, sir.

Q. Do you understand that when a man is filling in a printed form and he came to this "My last American passport was obtained from" and then there is a blank and then "and is submitted herewith for cancellation" and there is a blank, and that in each one of those blanks a line is drawn by the man, wouldn't you assume there was no previous passport?

A. No, not necessarily.

Q. Now then you say when you looked at this first mark you put on here after the words "I have resided outside of the United States as follows," when you came to that there was nothing in the intervening space of two lines, there was a blank and a blank after "from" and after "to"

and then the blank below that, you say there was nothing put in there by the applicant?

A. That is right.

Q. So you wanted to see that this was all filled out properly and you engaged in some conversation about that?

A. That is right.

[fol. 17] Q. You had already passed over two blanks up there where it says, "that I resided continuously in the United States from blank to blank," you knew that?

A. Yes, sir.

Q. But this one you wanted some conversation on?

A. This we needed a definite statement on.

Q. Now then this took place on July 18, 1936?

A. That is right.

Q. How many people did you talk to about applications for passports that day; have you any recollection at all?

A. No, sir.

Q. How many have you talked to since?

A. It is hard to say.

Q. Thousands, haven't you?

A. Undoubtedly.

Q. You don't tell us you have any independent recollection at this time of anything that was said by him or you at that time?

A. No, sir, I have not.

Q. If the man said to you, "I came to this country when I was an infant, I came into this country when I was a child, an infant," wouldn't you tell him that he had never established a residence abroad?

A. No, sir, I would not.

Q. Don't you know from your official position that an infant cannot establish a residence anywhere?

A. That doesn't enter into this question.

Q. Do you know that?

A. No, sir, I don't know about that, about the legal status and so forth.

Q. Residence is a question of intent, and nobody can intend anything until of legal age?

Mr. Werner: I object to the question, your Honor.

The Court: The objection is sustained.

Q. Well, if a man told you "that the only time I was out of the United States was when I was an infant under 21," wouldn't you write in the word "none"?

A. No, sir, I would have inserted the trip he made abroad.
[fol. 18] Q. The application doesn't say whether he was ever abroad?

A. It says, "I have resided outside the United States as follows."

Q. Does the application ask a man, "Did you ever make a trip abroad"?

A. Not in those words.

Q. The application asks a man, "Have you ever resided outside the United States," isn't that what it says?

A. That is right, and that is what we consider a residence.

Q. If the man said to you in answer to your question "Have you ever resided abroad," if he said to you, "I left there when I was still a young boy, while an infant," you would never have told him he had never resided abroad?

A. I would have inserted that trip in here.

Q. What trip.

A. The trip he had abroad.

Q. Supposing this man had told you that he came in on a certain ship?

A. That would have been put in above.

Q. Where?

A. In the first blank space up at the top.

Q. But you passed this application with that blank?

A. Yes, because that is to be filled in if born abroad.

Q. You passed it with that space blank just as you passed the other two blank places?

A. That space didn't refer to him.

Q. You tell us that when you asked this man for an answer to this question or this statement, "that I have resided outside the United States as follows," what you said to that man was, "Have you ever been abroad?"

A. That is the usual way of asking it, yes.

Q. Then if a man had taken a trip broad and not gotten off the steamer and came right back you would put that in as a residence abroad?

A. As having been out of the country or visiting on a trip.

Q. Don't you know that you were interested only in a time out of the country of five years or more, that that is the only interest the Government has?

[fol. 19] Mr. Werner: That is objected to.

The Court: That is not so.

Q. You are in charge of the Passport Division in Wall Street?

A. No, sir, I am one of the agents assigned there.

Q. How long must a man be continuously out of the country to break the continuity of his American residence, I mean as a matter of information?

The Court: The witness need not answer that.

Mr. Fowler: I am trying to find out.

The Court: You will find that in the books upstairs.

Mr. Fowler: I think I did find that out and I want to get it out of this witness.

Mr. Werner: I still object.

The Court: The objection is sustained.

Q. Do you know there is a provision in our law that breaks the continuity of a man's American residence by an absence of a certain number of years from this country?

Mr. Werner: That is objected to.

The Court: The objection is sustained.

Mr. Fowler: An exception.

Q. Well, you say as a passport agent you were interested even in an applicant touching a foreign shore and coming back?

A. Yes, sir.

Q. And that is your interpretation of this inquiry?

A. Yes, sir, that is my interpretation of the rules of the State Department as to passports and residence abroad.

Q. That is, you think this inquiry should be made about his residing outside the United States?

A. Yes, sir.

Q. Mr. Earle, if a man told you,—I don't know whether you answered this or not—if a man told you he entered this [fol. 20] country as an infant and had never been out of it save for a short trip after that, isn't it fair to assume you would have written in that same scrawl there "none"? Just yes or no.

A. No.

Q. You are not answering that in the light of the fact that the man is presently indicted?

A. No, sir.

Q. That is not in your mind at all?

A. No, sir.

Q. You have gone over this case with the District Attorney, haven't you?

A. Yes, sir.

Q. He has talked over his theory with you and you have told him what you knew about it?

A. He has not explained his theory, but I told him what happened in that application when it was taken.

Q. And that was in answer to his questions?

A. That is right.

Q. Now, in the margin of this application I see in print "Birth Certificate Seen." Did you put that stamp on?

A. I did.

Q. Did you put that on July 18, 1936?

A. That is right.

Q. Now up to that date how many birth certificates had you seen?

A. I couldn't say; thousands undoubtedly.

Q. And you had checked them back, hadn't you?

A. What do you mean?

Q. With your knowledge of what a birth certificate should be?

A. Yes, sir, I had.

Q. When you look at a paper handed to you as a birth certificate by this applicant—he handed it to you, didn't he?

A. Yes, sir.

Q. When you looked at that paper you brought to bear on it your experience of years and your knowledge of having examined thousands of birth certificates?

A. That is right.

Q. And you read that paper?

A. Yes, sir.

Q. Did that paper set up so far as the birth certificate goes the facts contained in this passport application?

A. It did.

[fol. 21] Q. It set out an Atlantic City birth and the date September 5th, 1896?

A. Yes, sir.

Q. And it was in regular legal form so far as—

A. So far as I was concerned.

Q. As far as you were concerned?

A. Yes, sir.

Q. You stamped it, didn't you?

A. Yes, sir.

Q. And you are the gentleman who put the stamp on the back of it?

A. Yes, sir.

Q. Where it says birth certificate inspected?

A. We have a rubber stamp that shows the date and we usually initial that on the back.

Q. Now I hand you what purports to be a photostat of the front and back of an Atlantic City Health Certificate.

Mr. Werner: I object to the description of a paper not in evidence.

Q. I hand you a photostat and call your attention to this stamp which appears on the back. I ask you if that refreshes your recollection sufficiently for you to state as a fact that that is a true copy of the birth certificate you saw at or about the time you affixed this stamp "Birth Certificate Seen" on the passport application of Robert William Wiener, Government's Exhibit 1. Is it?

A. It appears to be, yes, sir.

Mr. Fowler: I will ask that this be marked for identification.

(Marked Defendant's Exhibit A for identification.)

Q. I believe you told me that the birth certificate was shown you, a copy of which I have just shown you, contained information that checked with the information concerning birth in this passport application, Government's Exhibit 1, is that right?

A. That is right.

[fol. 22] Q. And I believe you told us that on its face, you having seen and passed on thousands of them at that time, you accepted this as a genuine certificate?

A. That is right.

Redirect examination.

By Mr. Werner:

Q. Mr. Earle, you were about to explain when Mr. Fowler stopped you why you didn't fill in the blank; "that I came to the United States, on or about" blank "that I resided continuously in the United States from" blank "to" blank. Will you explain why you didn't fill in anything there?

A. That space is—

Mr. Fowler: I object to the witness giving an explanation for what he failed to do in July of 1936.

The Court: I think he may.

Mr. Fowler: He is in a trial now and has been in consultation with the District Attorney about this.

The Court: He may state his reasons for it. Proceed.

The Witness: It is customary on such a blank as that to pass over this one blank because it was not relevant, as it says on it just to fill in if born abroad of American parents.

Mr. Fowler: I object to the answer and ask that it be stricken out as a conclusion of the witness.

The Court: The motion is denied.

Mr. Fowler: An exception.

Q. The witness has stated in this case he was born in the United States?

A. Yes, sir, that he was born in Atlantic City and that blank was not relevant, and naturally would not be filled in with anything.

Q. I mean "applicant" when I said "witness." You understood me?

A. Yes, sir.

[fol. 23] Q. Now with respect to your interpretation of the blank "that I have resided outside the United States as follows (State name of, and period of residence in, each foreign country)," regardless of your interpretation, what are the words you used to the applicant?

A. I asked him has he ever been abroad before.

Q. Can you state what the applicant answered in this case?

A. He answered in the negative because I have written the word "none."

Q. With respect to the words "Subscribed and sworn to before me July 18, 1936," can you state whether an individual whose photograph appears on the passport application appeared before you and said that the signature thereon was his?

A. Yes, he did.

Recross-examination.

By Mr. Fowler:

Q. I understand you to tell the District Attorney that because the applicant stated he was born in the United

States it was in no way relevant that he should answer the question that he had resided continuously in the United States, is that right?

A. No, I didn't say that. I said the space before that was not relevant.

Q. What is that?

A. "That I came to the United States on or about."

Q. You didn't ask him to explain the next?

A. No, sir, I did not.

Q. It was not relevant at all that he resided continuously in the United States if he was born in the United States, was it?

A. If he was born in the United States and had never been out of the United States it was natural he had always resided in the United States.

Q. If a man is born in the United States he cannot go out of it?

A. No, not that, but if he was born in the United States and has never been out of the United States he has always resided in the United States.

[fol. 24] Q. In issuing a passport are you interested at all in whether or not a native-born American citizen has been out of the United States?

A. Yes, sir.

Q. Does that affect citizenship?

A. It might in various ways.

Q. Can you tell us any way in which it would affect citizenship?

The Court: No, no.

Q. When he came to the United States, filling that in, was absolutely irrelevant in the case of a native-born American citizen?

A. That is right.

Q. And still you say it was relevant in the case of a native-born citizen for you to know whether he had resided out of the United States?

A. Yes, sir.

Q. And that too even though you were talking to him right here in the United States?

A. Yes, sir.

(Short informal recess.)

JOHN O. BELL, called as a witness on behalf of the government, being duly sworn, testified as follows:

Direct examination.

By Mr. Werner:

Q. Mr. Bell, what is your occupation?

A. I am the executive assistant to the chief of the Passport Division, State Department.

— How long have you been working for the State Department?

A. A little over nine years.

Q. What are your present duties?

A. My present duties are that subject to the direction of the chief of the Passport Division I exercise administrative supervision over the Division and the passport agencies.

[fol. 25] Q. Can you explain briefly how United States passports are issued?

A. Well, United States passports are issued to American citizens. In order for a person to get a passport it is necessary for them to make an application. The application must be executed before the clerk of a Federal Court or before the clerk of a State Court that has authority to naturalize aliens, or it may be executed before an agent of the Department of State in one of the Passport Agencies or at Washington.

With this application the applicant must present evidence that he is a citizen of the United States. This evidence will in the case of a native-born citizen be proof of his birth in the United States which is required to be a birth certificate, or if that cannot be produced, a baptismal certificate, or the affidavit of some person who is a near relative and has knowledge of sufficient facts about the birth to testify that the person was born in the United States.

If a man is a naturalized citizen he must submit evidence of naturalization which must be his naturalization certificate.

With his application he must also submit duplicate photographs of himself and pay a passport fee of \$9.00 for the passport and \$1.00 for the execution of the application.

The application is taken and sent by the clerk who took it or the passport agent who took it to the Department at Washington. There it is received and the fee accounted for and the application is examined by examiners who deter-

mine whether evidence has been submitted that the person is a citizen, and if the evidence has been submitted and it is in proper form the examiner approves it by writing his name on it and it goes to a section where a passport is actually written, and the passport has a photograph attached, and the seal of the Department of State impressed on it and a legend put through it, and then it is mailed out or sent to an agency for delivery.

[fol. 26] Q. I show you Government's Exhibit 4 for identification and ask you if this is a form of American passport issued in the year 1936?

A. Yes, sir, this is the passport form or blank that we have been using since Mr. Hull has been the Secretary of State, since 1933.

Q. Will you look at Government's Exhibit 1 and state if you can whether or not a passport similar in form to Government's Exhibit 4 for identification was issued on the application Government's Exhibit 1?

Mr. Fowler: If he knows.

Q. If you know.

The Court: If he can tell by examining the record.

The Witness: Yes, it is indicated that a passport written on a blank form identical with that one, the exhibit there, was issued.

Q. Have you that passport?

A. The passport issued on this application?

Q. Yes.

A. No, I have not.

Q. Has it ever been surrendered to the Department of State?

A. No, it has not.

Mr. Werner: I offer in evidence Exhibit 4 for identification.

Mr. Fowler: May I inquire, your Honor?

The Court: Yes, but make it brief.

By Mr. Fowler:

Q. What exhibit is that you have before you?

A. 1.

Q. What is on Government's Exhibit 1 that prompts you to state the fact that a counterpart of this document was issued on that?

A. There is a stamp on this exhibit indicating that a passport bearing a certain number was issued on a certain [fol. 27] date. I know that the forms of passports that have been issued for a certain period, since Mr. Hull has been Secretary of State, have been like that one, and this was issued during that period, therefore I am positive a passport of that form was issued.

Mr. Fowler: No objection.

(Government's Exhibit 4 for identification received in evidence.)

By Mr. Werner:

Q. Mr. Bell, you stated that marks are made on the passport application when it is received in Washington. Will you examine Exhibit 1 and explain what the marks on that application indicate?

A. I will take the application and begin in the upper righthand corner. Here you see a number 332207. That is the number which is the number of the passport issued on this application. Below that is a stamp which says "Passport Issued July 21, 1936, Department of State." That stamp is placed on the application at the time the passport is written. There is an initial in pencil in the upper lefthand corner which is the initial of the person who checked the transcription of the passport to make certain no inaccuracies were in the writing. There is a name written in red and a date across the center. That is the name of the examiner who approved the examination and the date it was approved. There is a stamp "Birth Certificate Seen" indicating that a birth certificate was submitted to the agent before whom the application was executed, and that he saw and examined it.

There is a stamp at the lower righthand corner which says "Passport Fee Received." That is a stamp placed on in the cashier's office indicating that the fee required had been submitted and had been accounted for by him. This number here is the number under which he accounted for it. [fol. 28] This stamp in the corner, "Passport Agency New York. Fee Received," and a blank left for the amount, indicates that the passport agent actually collected \$10 from the applicant.

There is a stamp in the center which says, "Filed July 24, 1936." That is placed on the application when it was

placed in the files of the Department after the passport was issued. There is a stamp in the upper lefthand corner which is merely a device used to indicate the place of application.

On the back of the application there is a space provided for the address to which the passport is to be sent. That has been crossed out and there is a stamp that shows that the passport is to be sent to the New York Agency where he can collect it rather than having it mailed.

And these initials here in blue are the initials of the person who actually wrote the passport.

Q. Will you examine Exhibit 4 in evidence, the passport, and state if you can what blanks were filled in on the passport which was issued on that application and what was put in those blanks by the writer?

Mr. Fowler: That is objected to. I don't mind the form going in, but for him to tell us what was written in, I object to that.

The Court: What is the custom down there? Do you write in the name of the person to whom it is issued?

The Witness: We write the number of the passport and the name of the person and the date issued and the personal description and affix the photograph.

Mr. Fowler: I must object to that as not the best evidence. It is pure speculation.

The Court: The objection is overruled.

Mr. Fowler: We cannot receive custom.

The Court: He has issued thousands upon thousands of them.

[fol. 29] Mr. Fowler: I submit it is no proof. I am not objecting to his testifying as to what the custom is.

The Court: He said the custom was to put in the name and affix the photograph. Just state what the custom was.

Q. Is a photograph of the applicant which is a duplicate of that affixed to his passport application inserted in the application?

A. Yes, on page 4 of the passport, pasted in there with a special glue, and the seal of the Department of State is placed on the photograph and a legend which is like a check writing machine says, "Photograph attached. Department of State, Washington."

Q. And also the place and the date of birth of the applicant as set forth in the application is written in?

A. They are.

Q. Now is a record kept, Mr. Bell, of passports sent via pouch to the New York Passport Agency?

A. Yes; sir, we keep a file record.

Q. And is Government's Exhibit 5 for identification such a record?

A. Yes, it is.

Mr. Werner: I offer Exhibit 5 for identification in evidence.

(Government's Exhibit 5 for identification received in evidence.)

Q. What does Government's Exhibit 5 show in regard to Robert Wiener?

A. Government's Exhibit 5 indicates that a passport, number 332207, issued in the name of Robert William Wiener, was sent from the State Department at Washington in a locked pouch to the New York Passport Agency, on July 21, 1936.

Q. Now, Mr. Bell, this passport has nothing written in after the number. Is there a number customarily printed in on the passport, Government's Exhibit No. 4?

[fol. 30] Mr. Fowler: I have to object to the balance of the question, your Honor. He is leading the witness.

Mr. Werner: I am trying to save time, your Honor.

Mr. Fowler: I know, but you are in too much of a hurry.

The Court: Go ahead. What is your answer?

The Witness: Passports are ordinarily furnished with the number already printed. We have blanks furnished for use in case some error is made in typing the passport itself.

Cross-examination.

By Mr. Fowler:

Q. Did I understand you to say there were several ways that a native born American could identify himself before the passport agent as a native born citizen entitled to a passport?

A. I said he had to submit evidence of citizenship, which may be in various forms. I neglected to state he had to be identified by a witness who had known him two years.

Q. What are some of the forms of citizenship that are acceptable to your agents?

A. Ordinarily we require a birth certificate which shows the place, date of birth of the applicant. We may accept evidence if a birth certificate cannot be procured, and there is no record of the person. It sometimes occurs that the person was baptized a short time after birth and we may accept the baptismal record. If neither of those are available, we will take an affidavit, preferably of any relative, father or mother best, or a brother or a sister, who has actual knowledge that the person was born and that person must state in his affidavit the basis of that knowledge.

Q. You have a form of identifying the witness on the application, haven't you?

A. Yes, sir.

Q. And in this instance you had a man named J. C. Lowry, swear before your agent that "I, the undersigned, solemnly swear that I am a citizen of the United States; that I reside at the address written below my signature [fol. 31] hereto affixed; that I know the applicant who executed the affidavit hereinbefore set forth, to be a citizen of the United States; that the statements made herein by the applicant are true to the best of my knowledge and belief; further, I solemnly swear that I have known the applicant personally for nine years." That is such an affidavit as you spoke of?

A. That would not be accepted as proof of citizenship, as there is no indication that is any knowledge of the applicant's birth.

Q. What is it on here for?

A. To identify the applicant, not the proof of citizenship.

Q. To identify him to you, you require that person there, a citizen, to swear that they have known the applicant, a citizen, and have known him for a certain length of time; you require all that just from a man who is only identifying the applicant, is that your testimony?

A. We require him to have known the applicant two years, and to swear to the best of his knowledge that the applicant is a citizen, he must be a citizen.

Q. That is, establish his citizenship. That is going a little further than identifying him.

A. It is only asking him to testify as to belief.

Q. That is going a little further than identifying the man who signed the application, isn't it?

Mr. Dunigan: That is argument, your Honor.

Q. Isn't it?

A. Not necessarily.

Q. It partakes of the nature of proof of citizenship?

A. It may be evidence not necessarily satisfactory.

Q. Now then the man who makes this application you say in the regular course of business, executes it before the agent?

A. He may execute it before an agent.

Q. He must execute it before an agent?

A. Before an agent or a clerk of the court.

Q. Were you in court when the agent testified,—Mr. Earle?

A. No.

[fol. 32] Q. When he said this application was not subscribed in his presence?

A. I was not present.

Q. To your knowledge, Mr. Bell, you don't know what was written in, what was issued to Mr. Wiener as a passport on this Government's Exhibit 1, the application, do you? You never saw it in your life?

A. I may have seen it. I don't know that I have.

Q. You have no recollection of seeing it?

A. That is right.

Q. Then of your own knowledge you don't know what was in it. All you know is what is the custom.

A. Yes, sir.

Q. It is also a custom that the applicant signs in the presence of the agent who takes his oath, just yes or no?

A. You mean in the application?

Q. Yes.

A. Ordinarily that is true. It may not be so in all cases.

Q. The application says, "Subscribed and sworn to before me this"—so it has got to be a custom. Isn't it a custom to follow the printed form?

A. Surely.

Mr. Fowler: I think that is all.

Redirect examination.

By Mr. Werner:

Q. Mr. Bell, in the event of there being a great many applicants at the agency, is it customary for the applicant, to save time, to be told to sign his name before he comes

to the officer before whom the oath is executed, and then acknowledged his oath before that officer?

Mr. Fowler: I object to that. It is not only leading, your Honor, but the District Attorney is testifying. He has not taken an oath.

The Court: He can tell us what happens when a crowd is there.

[fol. 33] The Witness: If we have a great many people coming in to one of our agencies, forms are given out and they are signed before one of the employes and then the applicant takes it to the agent, acknowledges his signature, and takes the oath of allegiance before the issue.

By Mr. Fowler:

Q. How do you know that?

A. I have seen it done.

Q. Did you see it done in this case?

A. No.

Q. You don't know whether that was followed in the case of Wiener, do you?

A. I was not present.

The Court: That is all.

RALPH TYSON FISHER, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Dunigan:

Mr. Dunigan: I would like to state, your Honor, that this witness is being called out of turn.

The Court: All right.

Q. Mr. Fisher, what is your occupation?

A. I am now employed by the State Department of Health as Assistant State Registrar.

Q. In the State of New Jersey?

A. In the State of New Jersey.

Q. And your office is located in Trenton, New Jersey.

A. In Trenton, New Jersey, yes, sir.

Q. How long have you been employed in the Department of Health at Trenton, New Jersey?

A. I have been employed at the department since May 1936.

[fol. 34] Q. Now, are you familiar with the law and practice in the State of New Jersey with respect to the recording of births?

A. I am.

Q. Would you explain to the Court and jury what the law of the State of New Jersey is on the recording of births, and the practice?

A. At the present time?

Q. Yes.

A. At the present time the law of New Jersey requires—

The Court: The present time or in 1896.

Mr. Dunigan: I will come to that.

Q. Can you state, Mr. Fisher, how long the law that is in effect now has been in effect with respect to that particular point?

A. There have been several amendments to that law, I just could not tell you how long.

Q. Tell us what the law is now.

Mr. Fowler: I object to that as having no bearing on the issues. I imagine that he is going to follow this with an attempt to prove the record. I understand they have to prove the existing law at the time the record was made.

The Court: That is what we are most interested in, of course.

Q. Let me ask you this question, Mr. Fisher: do you know what the law on the recording of births was on September 5, 1896?

A: Yes, sir, I know that. That was the law of 1888, it was in effect in 1896.

Q. What was the law at that time?

A. The law at that time required that the physician or the midwife in attendance at a birth, or if no person in attendance at birth, then either of the parents must report to the local registrar or the city clerk of the place in which the birth occurred. The fact of such birth and such report must be made within thirty days of the date of birth.

[fol. 35] The law further required that the local registrar,

or the city clerk, forward such original certificates to the Bureau of Vital Statistics in Trenton, to the Bureau of Vital Statistics of the State Department of Health in Trenton, and that such record should be forwarded before the 15th of the following month.

Q. After the birth?

A. After the birth.

Q. And when you say original certificate, you mean the original certificate of birth?

A. The original birth certificate, signed by the person in attendance at birth or by the parents.

Q. So under that law and practice there would be two records of birth?

A. Yes, sir, the local registrar would have a record and then there would be a record with the Bureau of Vital Statistics at Trenton.

Q. The record at the local registrar, what would that consist of?

A. The law required at that time that the name of the child, if given a first name, be reported, the maiden name of the mother, the name and residence of both parents, their occupation, the sex and color of the child and birthplace of both parents.

Q. And that would be an entry in a register, is that correct?

A. I am not sure that they would keep all that information on a local record.

Q. In any event, the registry of birth would be forwarded on to Trenton?

A. Yes, sir, and that would contain those particulars.

Q. Have you made a search of the records at Trenton with respect to ascertaining whether or not there is on file an original birth certificate of one Welwel Warszower?

A. I have.

Q. Would you tell us in detail, Mr. Fisher, just what search you have made of the records at Trenton?

A. I searched the records on file in the office of the Bureau of Vital Statistics of the State Department of Health [fol. 36] of New Jersey, and I did not find a record of the birth of Welwel Warszower, alias Robert William Wiener, alias William Wiener, alias Robert William Weiner, alias William Weiner, or any similar surname, beginning with the letter V, in Atlantic City or Atlantic County, of September 5, 1896, nor during the period from July 1, 1895 to

June 30, 1898; nor in the index of New Jersey births for the period from July 1, 1890 to December 31, 1900—

Mr. Fowler: I object to that answer as wholly irresponsible; in no way connected with the question that was asked. A prejudicial statement, if your Honor please, having no bearing on the subject under inquiry. Nobody has even hinted as to an alias. He was asked for the name Welwel Warszower and he immediately pours in aliases. I ask that that be stricken out.

The Court: I will strike that part out.

Mr. Fowler: I will ask your Honor to direct the jury to disregard that.

The Court: Disregard the aliases. You made a search against each of the names you mentioned?

The Witness: Yes, sir, each of the names.

Q. For what period?

A. I searched each of the names which I gave previously for Atlantic City and Atlantic County, for the date September 5, 1896, and for Atlantic City and Atlantic County for the period from July 1, 1895 to June 30, 1898; and I searched the index of New Jersey births, which covers all the births for the entire State, the index of births from the period July 1, 1890 to December 31, 1900.

Q. Now the search that you made was for birth certificates in the names mentioned, is that right?

A. That is correct.

[fol. 37] Q. Did you make any further search of any other records other than birth certificates?

A. I did not.

Q. Well, did you make any search other than a birth certificate search for other evidence of birth for the names mentioned?

A. I did not.

Q. Now you stated that you searched for the names that you mentioned, the last names, Wieners, for any surname, beginning with a V?

A. With the letter V.

Q. And for the same period for the others?

A. For those same periods, yes, sir.

Q. Now did you make any search for any delayed birth reports?

A. The search I made would have picked up any delayed birth reports which had been made.

Mr. Fowler: I object to that as calling for the witness's conclusion, your Honor.

The Court: You can tell how they run, how those delayed birth reports run?

The Witness: Yes, sir, if delayed birth certificates had been filed they would have appeared in the records which I searched.

Mr. Dunigan: Thank you.

Cross-examination.

By Mr. Fowler:

Q. How do you know that?

A. That is the practice of the department.

Q. How long have you been connected with the State Board of Health of New Jersey, in Trenton?

A. Since May of 1936.

Q. Did you ever lose any papers, or ever come to know of any papers lost in that department while you have been connected with it?

A. Not departmental papers.

Q. Any papers, I asked you. Have any papers become misplaced that were under your control?

[fol. 38] Mr. Dunigan: We object to that on the ground that it is irrelevant, your Honor.

The Court: Sustained.

Mr. Fowler: Exception.

Q. You talked this case over with the District Attorney, didn't you?

A. Yes, sir.

Q. You say the law of '88 was in effect in 1895, in New Jersey?

A. In 1895, yes, sir.

Q. When was the law of '88 repealed or changed in any way?

A. I don't know that.

Q. Do you know that it ever has been repealed or changed in any way?

A. I know it has been changed, yes, sir, because the provisions of the present law are different from the law of '88.

Q. What are they now?

A. The present law requires that every birth in the State shall be recorded, and reported within five days by the

physician or the midwife or person acting as midwife in attendance at the birth. If there is no medical attendance, the birth shall be reported by either parent.

Q. Reported where?

A. The birth shall be reported by the person required to do so, to the local registrar of the municipality or township in which the birth occurs.

Q. Is that all the law says about it?

A. There is quite a bit more to the law.

Q. Does the law direct that anything further be done in the report of that birth?

A. The law then requires that the local registrar shall keep a record of the birth certificates which are filed with him, that he shall number each one consecutively, beginning with number 1 for the first of the year, and that he shall forward, after examining such certificates to be sure that such are complete, and if they are found to be incomplete they shall be returned to the proper person for completion, and then on the 10th of the month he shall forward such [fol. 39] certificates as he receives during the preceding month to the State Registrar of the Bureau of Vital Statistics in Trenton.

Q. You were asked to search your State records against the name of Welwel Warszower, is that right?

A. That is correct.

Q. For some time prior to September 5, 1896 to and including a date some time subsequent, is that correct?

A. That is right.

Q. You were told to search against the name of Robert William Wiener, too, weren't you?

A. That is true, W-i-e-n-e-r.

Q. Were you shown any entry on a ledger or book carrying entries of birth, kept at Atlantic City, in the Board of Health there?

A. I have seen no such entry.

Q. You have not seen any entry like that at all?

A. I have not.

Q. You have not seen any entry purporting to be made of any name on September 5, 1896, in a book kept by the Board of Health or health authorities in Atlantic City since you became connected with this case, is that your story?

A. That is true.

Mr. Fowler: Have you got that book here?

Mr. Werner: Yes, sir (handing to counsel).

Q. Just so there won't be any mistake about this, I am identifying this book as Birth Register from 1880 to 1896, the City of Atlantic City. I won't open it. You will concede he has not seen it. I am identifying this book, as I have told you, and I ask you again, sir, has that book or any of its pages or any of its entries been shown to you by the District Attorney or by anybody in his office in connection with this case?

A. I have never seen that book.

Q. Before when?

A. Before now.

[fol. 40] Q. And now you have only seen the cover?

A. That is true.

Q. You searched against the name, Robert William Wiener?

A. That is true.

Q. You searched against the name, William Wiener?

A. That is correct.

Q. Those are the names you searched against?

A. Those are some of the names.

Q. What are the others?

A. Robert William Weiner and William Weiner, Welwel Warszower, and those same names, with a surname beginning with the letter V instead of W.

Q. Now I followed you down to Warszower. Will you give me the other names?

A. Welwel Warszower, Robert William Wiener, William Wiener, Robert William Weiner, and William Weiner, and then that same list of names spelled with a V instead of a W.

Q. And those are the only names you searched for in your State records at Trenton, are they?

A. That is correct.

Q. The law of 1888 required that a physician's certificate be filed with the Department of Health in the City of Atlantic City, New Jersey, before an entry of a birth could be made, isn't that so, you told us that, didn't you?

A. That is correct, no entry could be made unless there was a certificate.

Q. And you will be further fortified in your knowledge of that when I show you Defendant's Exhibit A for identification, and show you that is part of a form certificate signed by A. W. Bailey, M.D., on this certificate that was

issued to Robert William Wiener, aren't you? I mean you are more strongly fortified in your recollection of the 1888 law, as you look at that.

Mr. Dunigan: I think we will object to that question on the ground there is no proof that Dr. Bailey signed it. He is assuming he signed it.

[fol. 41] The Court: Sustained.

Mr. Fowler: I heard something about jumping from crag to crag. I don't think I am the only jumper, your Honor.

The Court: Was that form in use before that time?

The Witness: No, sir.

Q. At what time?

A. 1888-1896.

Q. This is a form of a certificate used. This says, "The following is a true and correct transcript of the record of birth."

A. It is merely a transcript and not given in the form of original certificates.

Q. It certifies that a certificate was filed by Bailey, doesn't it?

A. That is the evidence there. It reads, "The following is a true and correct transcript from the record of births in my office," and that is from the City of Atlantic City.

The Court: That purports to show a certificate was filed in Atlantic City.

Q. A certificate signed by A. W. Bailey, that is what it purports to certify?

A. That is what that purports to certify, yes, sir.

Mr. Fowler: I think that is all, sir.

Redirect examination.

By Mr. Dunigan:

Q. Just a moment. Look at Defendant's Exhibit A for identification and examining the first page there, Mr. Fisher, that only purports to be a true copy of the records in the office at Atlantic City, isn't that so?

A. That is true.

Mr. Fowler: I object to counsel testifying. It is worse than leading. He is telling the witness what the paper

purports to be, and the witness knows more than he does about it.

[fol. 42] Q. Is that what it purports to be?

A. I read it before: "The following is a true and correct transcript from the record of births in my office," and that is signed by the Registrar of Vital Statistics in Atlantic City, so it purports to be a transcript of record of births in Atlantic City.

Q. Aside from that record, the original birth certificate would have been forwarded on to Trenton to file?

The Court: In the ordinary practice.

Q. In the ordinary practice?

A. Yes, sir.

The Court: We will suspend now until two o'clock tomorrow afternoon. I have another hearing set for the morning.

Mr. Fowler: May I at this time offer the exhibit for identification in evidence, to be substituted by the original, if, as and when the original arrives here. I have got this here now but not the other your Honor.

Mr. Dunigan: I think we should leave it as marked for identification.

Mr. Fowler: With the understanding that we can introduce the original if and when it turns up.

(Adjourned until Friday, February 9, 1940, 2.00 p. m.)

New York, February 9, 1940;
2:00 p. m.

Trial Resumed

RAE WHITE, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination.

By Mr. Dunigan:

Q. Miss White, will you keep your voice up so that these people in the rear can hear you?

A. Yes, sir.

[fol. 43] Q. You were formerly employed at the World Tourists, Inc.?

A. Yes, sir; I was.

Q. That is a travel bureau which was located in the Flat-iron Building at 23rd Street and Fifth Avenue?

A. Yes.

Q. I show you this paper marked Government's Exhibit 3 in evidence and I call your attention to the writing, Rae White, 325 W. 4th Street. Do you recognize the writing?

A. Yes, sir.

Q. Whose writing is it?

A. It is mine.

Q. What were your duties at the office of the World Tourists, Inc., Miss White?

A. I was a messenger——

Mr. Fowler: Let us have the time fixed.

Q. You will note that the date on that paper is July 21, 1936; is that correct?

A. July 22, 1936.

Q. And at that time were you employed at the office of the World Tourists, Inc.?

A. Yes, sir; I was.

Q. Will you tell the Court and jury what your duties were at the World Tourists, Inc.?

A. I went out with passports, to get visas, and other deliveries and errands and I attended the switchboard and did various other duties, such as preparing literature for the racks for the trip.

Q. In the course of your employment there did you have occasion to go to the office of the Passport Agency in New York City?

A. Yes, sir; I did.

Q. Would you tell us how many times you went to the Passport Agency, approximately?

Mr. Fowler: I object to that as incompetent, irrelevant and immaterial. If the District Attorney is going to prove by this witness that she secured a passport, as witnessed by her receipt, I concede that, to save time.

The Court: I think she can tell us how many times she went down for these passports.

[fol. 44] Mr. Fowler: Yes, sir.

Mr. Dunigan: I withdraw the question.

Q. Can you recollect from whom you received this paper, Miss White?

A. It was given to me in the office. I don't recollect by whom.

Q. You mean in the office of the World Tourists, Inc.?

A. Yes, sir.

Q. After you received it, what did you do with it?

A. I took it to the Passport Agency and I received a passport in exchange.

Q. What did you do with this paper (indicating)?

A. I don't remember, but I believe I left it there.

Q. Now you stated that you received a passport when you went down with this paper. Can you tell us what you did with the passport?

A. I brought it back to the office.

Q. Of the World Tourists, Inc.?

A. Yes, sir.

Q. And do you recall who you gave it to there?

A. No, I don't remember exactly to whom I gave it.

Mr. Dunigan: All right; that is all, Miss White.

Mr. Fowler: No cross-examination.

(Witness excused.)

LOFTUS MURRAY, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination.

By Mr. Dunigan:

Q. Mr. Murray, what is your occupation?

A. I am a clerk at Ellis Island in the Record Division.

Q. And that is the Department of Labor?

A. The Department of Labor.

Q. I show you this document, it is marked Government's Exhibit 6 for identification, and I ask you if that is a record [fol. 45] kept in the regular course of business at Ellis Island?

A. Yes, sir; this is an original manifest.

Q. Does that manifest indicate the arrival at the Port of New York of one Robert Wiener on September 25, 1937—on September 30, 1937?

Mr. Fowler: I object to that question as calling for a conclusion.

The Court: Does it show an entry there?

Q. Does the manifest show such an entry, Mr. Murray?

A. It does.

Mr. Dunigan: I will offer Government's Exhibit 6 for identification in evidence. (Showing to counsel.)

Mr. Fowler: You are offering page 7, just that entry (indicating)?

Mr. Dunigan: Yes, sir.

Mr. Fowler: No objection.

(Government's Exhibit 6 for identification received in evidence.)

Q. I show you Government's Exhibit 7 for identification, Mr. Murray, and ask you if that is a record kept in the regular course of business by the Department of Labor at Ellis Island?

A. Yes, sir; it is.

Q. Does that record indicate the arrival of one Welwel Warszower on the SS-Bremen at the Port of New York on June 5, 1932—

Mr. Fowler: If your Honor please, I object to that.

- The Court: Whatever you find with reference to the man named Warszower.

Mr. Fowler: I object to that as incompetent, irrelevant and immaterial, specifically on the ground that whatever use that record will show is not any use contemplated within [fol. 46] Section 220 of the United States Code.

The Court: Overruled.

Mr. Fowler: I further object to it, if your Honor please, on the ground that there is no proper foundation, there has been no continued custody of that document shown.

The Court: Is this one of the regular books of entry at Ellis Island?

The Witness: Yes, sir.

The Court: Brought from there?

The Witness: The original manifest is kept there.

The Court: Of the SS Bremen, on that trip?

The Witness: Yes, sir.

The Court: Overruled.

Mr. Fowler: I further object to it on the ground that it is not the best evidence under this indictment. The passport is the best evidence, and that has not been accounted for, or its absence.

The Court: I will take it.

Mr. Fowler: Exception.

Mr. Dunigan: I offer in evidence Government's Exhibit 7 for identification (showing to defense counsel).

Mr. Fowler: If you- Honor please, each objection that I made was intended to be made to the manifest of the Normandie as to the use of the passport. I thought the manifest of the Normandie was before this witness when I made those objections. There is no objection to this. This is an entry of 1932. So, may the record note my objection to the receipt of the manifest of the Normandie and the same rulings of the Court and exceptions taken?

The Court: Yes.

Mr. Fowler: There is no objection to this.

[fol. 47] (Government's Exhibit 7 for identification received in evidence.)

(Mr. Dunigan reads Government's Exhibits 6 and 7 to jury.)

That is all.

Cross-examination.

By Mr. Fowler:

Q. Mr. Witness, I am calling your attention to Government's Exhibit 6, which appears to be the manifest of the Steamship Normandie. Did you bring this exhibit to the Court with you?

A. Yes, sir; I did.

Q. In whose custody or from whose custody did you secure this exhibit?

A. It came from the Immigration and Naturalization Building at Ellis Island, the records that they keep.

Q. Immigration and Naturalization Department, does that concern itself with passports or with the entry of aliens?

A. The entry of aliens—

Mr. Dunigan: We object to that question. We think that is a question of law.

The Court: I think so.

This is the original manifest handed in by the purser of the steamship?

The Witness: Yes, sir; that is correct.

Q. You notice on this page there appears opposite every name a purported number of a passport; isn't that the fact?

A. Yes, sir; that is correct.

Q. Then would that mean or indicate to you in your official position that no one named on that page is an alien?

Mr. Dunigan: If the witness knows.

Q. If you know, from your experience. Now there is a passport number alleged to have been put after every name [fol. 48] on that manifest, on that page (indicating). Would that indicate to you from your knowledge of the job that every one of those people was or claimed to be a citizen?

A. It would not indicate to me that.

Q. Well, every one of them had a passport, from that entry?

A. The record shows that every name listed there is a United States citizen.

Q. That is what I want. And in spite of the fact that the Department of Labor has jurisdiction over aliens, you say this record, which concerns citizens, was secured by you from that department; is that so?

A. Yes, sir; that is correct.

Q. Who in that department had this record, so far as you know?

A. We have.

Q. How many men in that department had custody of this record, Government's Exhibit 6?

A. The records are open to all Government employees in the Record Division.

Q. They are open to all Government employees in the Record Division?

A. Yes, sir.

Q. That means in the Division, Department of Labor at Ellis Island, concerning this exhibit?

A. That is correct.

Q. How many such employees were there, if you know, in September, 1937?

A. Approximately 100.

Q. And has that number increased or decreased since September 26 or 25, 1937, to the present time?

A. I think there are fewer there now.

Q. Do you know of your own knowledge when this Government's Exhibit 6 was written?

A. Well, I know it is customary to deliver the original manifest to the Record Division.

Q. Who delivers that manifest to the Record Division of the Department of Labor, is it, at Ellis Island?

A. It is sent over from the Boarding Division after they have finished making their inspection.

[fol. 49] Q. How many men are in the Boarding Division or how many men were in the Boarding Division on September 25, 1937 in New York Harbor, if you know?

A. I don't know how many there were.

Q. About?

A. Well, probably 30 or 40.

Q. And some one of the 30 or 40 would send this record over to the Department of Labor at Ellis Island; is that right?

A. I believe that it is customary to have it sent over by the man in charge of the Boarding Division.

Q. Would he make this out, or somebody in his office?

A. No, it was not made out by anybody in the Government service. It is made up by the purser of the vessel.

Q. Made up by the purser of the vessel?

A. Yes, sir.

Q. When a person leaves a steamer, does he exhibit—that is a citizen—does he exhibit his passport to the purser?

Mr. Dunigan: I object to that on the ground it is a question of law.

Mr. Fowler: I am merely seeking the practice.

The Court: Do you know the practice?

The Witness: No; I could not answer that.

Q. You do know, don't you, that the agent from your department is present requiring identification of each passenger before certifying to their landing; you know that; that is why he is there?

A. I don't know the procedure. That comes under the Boarding Division. I am here representing the Record Division.

Q. If you don't know, tell me, and I won't proceed. If you know from your experience there, just tell us. We are just probing around trying to find out something. Do you know from your experience with the Department of Labor—I withdraw the question.

Q. How long have you been in it?

A. Nine years.

[fol. 50] Q. In those nine years haven't you become familiar with the custom of allowing passengers in the harbor, in the Port of New York?

A. No; nothing to do with my work.

Q. What is your work?

A. That of searching records referring to aliens, United States citizens, and members of the crew, in connection with naturalization and immigration matters; certain records only.

Q. And you search records that you don't know how they are made up; is that your story? I mean, the records you search for, you don't know how they are made up or by whom, do you? You say you search records?

A. Yes, sir.

Q. Of incoming passengers in this harbor; is that right?

A. Yes, sir.

Q. And when you search those records, you don't know how those records are made up; is that it; or do you?

A. No; I don't know all about how they are made up.

Mr. Dunigan: We are going to object to this on the ground that it is irrelevant.

The Court: It makes no difference.

Q. Do you know whether the purser is present when the agent of the Department of Labor is accepting or rejecting evidence of passengers seeking entrance into this port?

Mr. Dunigan: We object to that.

The Court: Sustained.

Mr. Fowler: Exception.

Q. You told us that the purser, to your knowledge, made this Government's Exhibit 6?

A. Yes, sir; that is correct.

Q. You don't know from what information he made it? I mean from your knowledge of the custom?

A. From my knowledge I could not testify to that.

Q. Have you met up with the purser of that ship on your visit to the district attorney's office?

[fol. 51] Mr. Dunigan: We object to all this questioning on the ground that it is immaterial.

The Court: Yes.

Mr. Fowler: Do you sustain the objection, your Honor?

The Court: Yes.

Mr. Fowler: I think that is all.

I move that Government's Exhibit 6 be struck on the

ground that there is no foundation for it, as even secondary evidence, and it clearly is not the best evidence.

The Court: Motion denied.

Mr. Fowler: Exception.

Redirect examination.

By Mr. Dunigan:

Q. Mr. Murray, on Government's Exhibit 6, referring to this No. 7 page, that is only a list of persons who claimed to be American citizens, isn't that correct?

Mr. Fowler: I object on the ground that not only is counsel leading, but he is testifying, and all this witness has got to do is to nod his head.

The Court: There is no assurance in any case, outside of the passport of one, that he is an American citizen?

The Witness: On this manifest the aliens are separated from United States citizens; there are separate sheets for all United States citizens. This is a United States citizen sheet.

The Court: That is, persons who have identified themselves as citizens.

Q. Or for all persons who are traveling on American passports, is that correct?

A. Yes, sir, that is correct.

[fol. 52] Recross-examination.

By Mr. Fowler:

Q. Look at Government's Exhibit 6. Do you know of your own knowledge that anybody whose name appears on there identified himself as an American citizen?

A. No, I don't know that.

Mr. Fowler: That is all.

Mr. Dunigan: That is all.

JOHN M. FAIRE, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination.

By Mr. Dunigan:

Q. Mr. Faire, what is your occupation?

A. Immigrant inspector.

Q. And how long have you been an immigrant inspector?

A. 1931.

Q. Would you tell the Court and jury what your duties are as an immigrant inspector.

A. Boarding arriving incoming ships, examining the passengers to determine which are citizens and the admissibility of aliens into the United States.

Q. Are you a member of the first group that boards an incoming passenger ship?

A. I am.

Q. So that all of the persons on board the vessel when you board the vessel were on it at the last port that the vessel touched at, is that it?

A. They are.

Q. I show you Government's Exhibit 6 for identification. It is an original manifest of the S. S. Normandie, arriving at the Port of New York September 30, 1937. Now, I direct your attention to this numbered page 7. Have you ever seen that manifest before, Mr. Faire?

A. Yes, sir, I have.

Q. You will note at the bottom there that the name Robert Wiener appears; do you see that?

A. Yes, sir.

[fol. 53] Q. What is indicated by the manifest, Mr. Faire, as to the individual Robert Wiener?

A. You mean as to his citizenship?

Q. Yes.

A. The manifest indicates he was an American citizen and was admitted to the United States as an American citizen.

Q. Now I call your attention to the writing at the bottom. Do you recognize that writing?

A. That is my signature.

Q. And what is the writing below your signature?

A. Inspected 8.15 A. M.

Q. Now, from looking at the manifest, Mr. Faire, can you state whether or not you examined all of the individuals on that sheet?

A. Yes, sir, I can. Check marks appear on all the names on the sheet.

Q. What is indicated by the manifest, Mr. Faire, with respect to the birthplace of the individual Robert Wiener?

A. Born in Atlantic City, New Jersey, September 5, 1896.

Q. Now, approximately during your service as an immi-

grant inspector, how many individuals have you examined on incoming passenger ships?

A. I would not want to give an approximate number—

Q. A great number?

A. —except to say a great number.

Q. Do you have any independent recollection of the arrival of this particular individual Robert Wiener?

A. No, I don't.

Q. Can you state from looking at the manifest, Mr. Faire, whether or not the passport of the individual Robert Wiener was presented to you?

A. Yes, sir, I can.

Q. On what do you base your statement?

A. The number of the passport, No. 332207, is entered on the manifest and it is my invariable practice when the number of the passport appears on the manifest to ask for that passport and have it shown to me.

[fol. 54] Q. In 1937 what was the practice, Mr. Faire—I will withdraw that question. You stated that it was your invariable practice to ask for the passport?

A. That is correct.

Q. And you state that was shown to you?

A. That is correct.

Q. By whom?

A. By the passenger.

Q. In 1937 what was the practice with respect to the returning of passports after you had examined them?

A. The passport was returned to the passenger.

Q. And that practice continued on up to some recent time?

A. Until approximately September of 1939.

Q. Until the outbreak of hostilities in Europe?

A. That is it.

Q. What is your practice, Mr. Faire, with respect to the landing of persons when you examined them?

A. They present their credentials and a landing card. If the individual is passed, we stamp the landing card with a rubber stamp marked "Passed."

Q. Were credentials presented in this particular case by the passenger?

A. Yes, there was.

Q. What did you do?

A. I presumably stamped the landing card and admitted the passenger as a citizen of the United States.

Q. Now, on the passport there — a photograph?

A. That is correct.

Q. Do you compare the photograph with the appearance of the individual who presents the passport to you?

A. Compare the photograph with the individual who presents it.

Q. When you stated that this individual presented credentials to you, what credentials did he present?

A. A United States passport.

Cross-examination.

By Mr. Fowler:

Q. Mr. Faire, you testified that your name is signed at the bottom of Government's Exhibit 6.

A. That is correct.

[fol. 55] Q. That is here (indicating)?

A. That is correct.

Q. Is that signed in pencil?

A. In indelible pencil.

Q. And that you signed on the date that the exhibit bears, September 25, 1937?

A. No, sir, that is incorrect; September 30, 1937.

Q. I beg your pardon. That stamp September 25th is the sailing date.

A. Yes.

Q. And the other date is the date of arrival?

A. Yes, sir.

Q. And you signed this "John M. Faire, Inspector"?

A. Yes, sir. Time 8.15 A. M.

Q. Were you alone that morning inspecting the arrivals on that ship?

A. Alone on the ship?

Q. Were you the only agent there?

A. No, I was not.

Q. You have assistants?

A. Several.

Q. And each assistant takes a table and a line?

A. That is correct.

Q. And they compile their records and bring them to you as chief agent?

A. They compile the records and deliver them to the chief agent, which was not me.

Q. I thought you said you were chief agent.

A. No, sir, I did not.

Q. Then that page, Government's Exhibit 6, was your special job that morning?

A. This particular manifest right here, yes, sir.

Q. There were more passengers which came in than shown on Government's Exhibit 6?

A. Yes, sir.

Q. Those on that page which is Government's Exhibit 6 you took care of?

A. All the passengers listed on this manifest, that is correct.

Q. You took care of?

A. That is right.

Q. Now, need an American citizen have a passport to get by you coming in?

Mr. Dunigan: That is objected to as a question of law.
[fol. 56] The Court: He may answer.

Q. Need he?

A. No, he does not.

Q. He can use anything that satisfies you to identify himself as an American citizen?

A. That is correct.

Q. Your job is in the Department of Labor?

A. That is right.

Q. And your jurisdiction is over aliens and not citizens?

A. I have jurisdiction over aliens and citizens when I am satisfied that the person presenting himself is a citizen.

Q. Just that minute when you are satisfied he is a citizen your jurisdiction ends?

A. That is correct.

Q. And he has the right to enter, passport or no passport?

A. After he has satisfied me he is a citizen of the United States.

Q. For instance, if he came up a line and said, "I have lost my passport, but here is my birth certificate," it is O. K.?

A. A birth certificate would not necessarily prove the citizenship, no.

Q. It would be proof of the birth?

A. Yes, it would be proof of the birth.

Q. If it proved an American birth, wouldn't you be satisfied?

A. If the certificate was absolutely in order I think I would be satisfied.

Q. Any proof that would satisfy you of his American birth would pass him into the country as an American citizen?

A. That is right.

Q. It wouldn't have to be a passport?

A. No.

Q. Did you make any writing on the list of names as to what the people showed you yourself?

A. No, I did not.

Q. That typewritten sheet, which is Government Exhibit 6, was already prepared when you got on board the ship, was it?

A. That is correct.

Q. Do you know by whom?

A. The purser on board the vessel.

[fol. 57] Q. Do you know when?

A. No, I do not.

Q. Do you know from what data he prepared it?

A. Well, I can not answer—

Q. Of course you wouldn't know that, that would be the operation of his mind.

A. No, I couldn't tell that.

Q. You never checked it back with him to see if his manifest was correct; you took the product of the man as he gave it to you?

A. I don't understand the question.

Q. You never went over the list with the man and did the physical writing of the list?

A. I was not interested in his list.

Q. Then you did not, did you?

A. No, sir.

Redirect examination.

By Mr. Dunigan:

Q. Mr. Faire, is it customary for American citizens returning from a foreign land to present their passports?

A. Yes, it is.

Q. And did the individual Robert Wiener present his passport in this particular case?

A. Yes, sir.

Recross-examination.

By Mr. Fowler:

Q. Mr. Faire, have you now a separate clear recollection from which you can testify as a fact that this defendant physically exhibited to you a passport some time after 8 A. M. on the morning of September 30th way back in 1937,—have you?

A. From the fact that the passport number is on the manifest I have.

Q. Then you were relying on a document you did not prepare to refresh your recollection?

A. That is correct.

Redirect examination.

By Mr. Dunigan:

Q. But it is with respect to a document that you yourself checked, isn't that so?

[fol. 58] Mr. Fowler: I object to that.

The Court: Get along, gentlemen. Do you mark on that manifest when a man identifies himself,—do you make any entry on the manifest when a man identifies himself as an American citizen?

The Witness: The whole manifest is of American citizens.

The Court: And when the man presented his passport what did you do?

The Witness: That check mark shows he was admitted as a United States citizen.

The Court: On a passport?

The Witness: Not necessarily.

The Court: Can you tell us whether he had a passport?

The Witness: From the fact the number of the passport appears there.

Q. And you checked—

Mr. Fowler: That is objected to.

Q. Did you check the information on the manifest with information in the passport?

A. That is correct.

Recross-examination.

By Mr. Fowler:

Q. Are these your checkmarks?

A. Yes, sir.

Q. You used a different pencil from the one you signed your name with?

A. I can't tell you that.

Q. The checkmarks are in black and the other marks are with indelible pencil.

A. I can't tell whether those are two different pencils or not.

Q. That is your testimony?

A. That is right.

[fol. 59] ALFRED C. BAER, called as a witness on behalf of the government, being duly sworn, testified as follows:

Direct examination.

By Mr. Dunigan:

Q. Mr. Baer, what is your occupation?

A. Customs inspector.

Q. How long have you been a customs inspector?

A. Approximately 12 years.

(Paper marked Government's Exhibit 8 for identification.)

Q. I show you Government's Exhibit 8 for identification, baggage declaration No. 317621, and ask you if you have seen that before?

A. I have.

Q. Is that a record kept in the regular course of business by the Customs Bureau?

A. It is.

Mr. Dunigan: I offer it in evidence.

Mr. Fowler: There is no objection to that document.

(Government's Exhibit 8 for identification received in evidence.)

Q. Now, Mr. Baer, from examining Government's Exhibit 8 in evidence will you please tell us the name of the incoming passenger?

A. Robert William Wirner.

Q. How is it spelled?

A. W-i-r-n-e-r.

Q. What?

A. I would say W-i-r or W-i-e-n-e-r.

Q. Can you tell from examining the baggage declaration what the individual came in on,—what ship?

A. Yes, sir; the Normandie.

Q. What is the date?

A. September 30, 1937.

Q. And that is the date you examined the baggage of the individual, Robert William Wiener?

A. It is.

[fol. 60] Q. Would that be the same date of the arrival of the boat?

A. It would.

Q. Will you tell us in examining the baggage of an individual coming in from abroad what your procedure is?

A. The first question I ask the man is to acknowledge his signature and whether or not the declaration covers everything he has acquired abroad.

Q. Anything else?

A. No, sir.

Q. Now, what does the baggage declaration, Government's Exhibit 8, indicate with respect to the baggage of the individual?

A. That he had one trunk and three hand pieces.

Q. You notice some pencil notations on the side there, Mr. Baer; do you recognize that writing on the righthand side?

A. That is mine.

Q. Do you have any recollection now, Mr. Baer, of this particular baggage declaration and examination?

A. No.

Q. How many persons do you examine say over a period of a year?

A. Several thousand.

Q. You notice some writing in the lower lefthand corner, Mr. Baer. Can you tell us what that writing is?

A. The passenger's signature.

Q. What else?

A. My own signature, the date, the number of pieces passed, and the labels that I used.

Q. The date there would be the date of the examination?

A. That is right.

Q. You will notice at the top of the exhibit that some of the writing is in pencil, the word "Birth" and the word "Date"; can you tell us anything about that?

A. That was there when I received the declaration. Can I explain further there?

Q. Yes.

A. If it were not there the stamp officer would have put a blue X up there and made a notation to fill in. That is not there, and the pencil notation was present at the time the stamp officer received the declaration, which was previous to the time it came to me.

[fol. 61] Q. Is there any writing on that exhibit in your handwriting except the items which you have specifically referred to?

A. "T. A. 163 Nothing to follow," and my initials, the date, the baggage label, and my signature is the only thing in my writing.

Cross-examination.

By Mr. Fowler:

Q. When did you first see Government's Exhibit 8 after September 30, 1937, and before today?

A. Last Friday.

Q. At that time you had some talk with the district attorney about it, did you?

A. Yes, sir.

Q. Are you familiar with this notice to bearers of passports, revised January 16, 1939, printed by the Government Printing Office?

A. No, sir; that doesn't come under our department.

Q. Do you know that it states that when a foreign resident—

Mr. Dunigan: We object to this.

Mr. Fowler: Please may I get my question on the record?

The Court: We will not have the contents that way.

Mr. Fowler: May I offer pages 20 and 21 of this document, Notice to bearers of passports?

Mr. Dunigan: I object to it.

The Court: This is dated 1939, and I don't know whether it is applicable to the time this alleged offense took place.

Mr. Fowler: May I have it marked for identification.

(Marked Defendant's Exhibit B for identification.)

[fol. 62] * Q. You don't know anything from your position about the government regulations or laws concerning foreign residents, of naturalized citizens as opposed to natural born citizens?

A. It has no bearing on customs matters.

Q. I hand you Government's Exhibit 8 and ask you in its body if it doesn't state that Robert William Wiener was a citizen of the United States?

Mr. Dunigan: I think the document speaks for itself.

The Court: Yes.

Q. Does it? Just answer yes or no. Does he describe himself as a citizen of the United States?

A. We are not interested in citizenship; we are interested in residents as a customs matter.

Q. All right. Were you present when he made this out?

A. No, sir.

Q. Did you give him a pencil to write in the word "birth" and the word "date"?

A. No, sir.

Q. Did you see him write in either of those words?

A. No, sir.

Q. You only know when you saw this certificate—when was it last before today?

The Court: He said last Friday.

Q. Those words were there last Friday, is that right?

A. Yes, sir.

Q. As far as the ink writing on this signed by Wiener, where the word "birth" and the word "date" appear now, that was blank so far as the ink writing is concerned, isn't that so?

Mr. Dunigan: We do not think that has any bearing on the issue here at all.

[fol. 63] A. I don't understand.

Q. (Read.)

Mr. Dunigan: We object to the question.

The Court: Let me see it. Sustained as to the entry. It is in pencil.

Mr. Fowler: May I except to that observation of your Honor?

The Court: Certainly.

Q. You didn't see Wiener write the word "birth" or the word "date", did you?

A. No, sir.

Q. You don't claim it is in the same handwriting, do you?

A. I don't; I don't know.

Mr. Fowler: May I show this to the jury at this time while this matter is fresh in their minds?

The Court: Yes.

Redirect examination.

By Mr. Dunigan:

Q. If a passenger presents to you a baggage declaration with blank spaces, what would your procedure be?

Mr. Fowler: Objected to. I don't mind him asking what the procedure was in this case.

Q. What was your procedure?

The Court: He may state what he would do if there were any blanks.

A. There were no blanks.

Mr. Fowler: I object to the question, What would he do?

The Court: He is asked what his practice is as to the blank.

The Witness: To have the passenger fill it out.

[fol. 64] Recross-examination.

By Mr. Fowler:

Q. So clearly where the word "birth" and where the word "date" appears there were blanks?

Mr. Dunigan: That is not what he said.

A. They were not blanks at the time I received the declaration.

Q. Is it your contention that the man wrote that in—

The Court: He is not contending anything.

Q. Were you the first man that got that application from Wiener?

A. No, sir; the purser of the ship was the first to get it.

Q. In other words, that application was first handed to the purser of the ship?

A. Yes, sir.

Q. You don't know whether this is the purser's handwriting or Wiener's, do you?

A. I do not.

Q. Does that paper refresh your recollection at all as to what you might have done when it came to you when you say if there were blank spaces there you would have had them filled in?

A. There was no blank spaces, because if there were there would be a blue X and the stamp officer would put "fill in".

Q. You had nothing to do with the word "birth" or the word "date"?

A. No, sir; it was there when I received that application.

Q. And when it came to you those two words were in pencil and the rest in ink?

A. That is right.

Q. Did you say anything to Wiener about that?

A. No, sir.

Q. Didn't you ask him whether he wrote those words?

A. That would not be necessary.

Q. Did you?

A. No.

[fol. 65] Redirect examination.

By Mr. Dunigan:

Q. When this declaration came to you, did you have Wiener acknowledge his signature to it before you?

A. Yes, sir.

Q. And he did?

A. Yes, sir.

Recross-examination.

By Mr. Fowler:

Q. Did you call his attention then that part of that document was in his hand in ink and part was in pencil, and did he adopt the pencil—did you say that to him in substance?

A. 75 per cent of the declarations——

Q. Did you, yes or no?

A. No.

PAUL BAILY, called as a witness on behalf of the government, being duly sworn, testified as follows:

Direct examination.

By Mr. Dunigan:

Q. Mr. Baily, where do you reside?

A. At Tiffin, Ohio.

Q. Did you have a father by the name of Alfred Baily?

A. Alfred William Baily, yes, sir.

Q. Where is he now?

A. At the present time he is deceased.

Q. Did he formerly reside in Atlantic City, New Jersey?

A. Yes, sir.

Q. And practice there?

A. He practiced, that is right.

Q. Do you know when he left Atlantic City approximately?

A. I believe it was November, 1918; I think I am correct on that.

Q. Do you know where the records of his profession are?

A. No, I don't; I never saw them.

Q. Do you know if they are in existence?

A. No, I really don't. To the best of my knowledge I would say they are not, but I have no definite information.

[fol. 66] Q. You never saw them?

A. No, sir.

Cross-examination.

By Mr. Fowler:

Q. What is your business?

A. I am an electrical engineer.

Q. Do you know whether or not on September 5, 1896, your father confined Mrs. Solomon Wiener in Atlantic City and delivered her of a male child?

A. No, sir; I don't know that.

Redirect examination.

By Mr. Dunigan:

Q. As far as you know, are there any records in existence indicating the proposition just put to you by Mr. Fowler?

A. No, I would not know that there were.

Recross-examination.

By Mr. Fowler:

Q. Are you the oldest child?

A. Yes, sir.

Q. How old were you when your father died?

A. How old was I?

Q. Yes.

A. He died last year and that would make me at that time 52.

Q. Did he practice up to the time of his death?

A. No, he had retired six years, I think it was, prior to that.

Q. And where did he live at the time he retired from practice?

A. At the time he retired he was in Norwich, Connecticut.

Q. Was he practicing medicine there?

A. He was practicing there.

Q. He was admitted in Connecticut too?

A. That is right.

Q. How old were you when you left his home?

A. Let's see; I should say about 22.

Q. You -new then, didn't you, Mr. Baily, that doctors kept records of their cases?

A. Yes, I knew that to be the case.

[fol. 67] Q. Now, when your father died his home broke up, did it?

A. His—when he died?

Q. Yes.

A. His home had been broken up before that.

Q. When was his home broken up?

A. At the death of my stepmother—my father was married twice—in 1922 or 1923; 1922 I think it was.

Q. At that time was it customary to keep the furniture and books and whatnot of the father and then they were usually divided among the children?

A. I suppose in some cases, yes.

Q. Did you get any of them?

The Court: What difference does it make?

Mr. Fowler: I merely want to do my best to search for this record.

The Court: Ask him if he has any records.

Q. Did you get any books of your father's?

A. No, sir.

Q. Weren't you interested in any of the effects of your father's?

Mr. Dunigan: We object to this line of questions.

The Court: Sustained.

Mr. Fowler: An exception.

Q. You knew he kept a record of this practice, but you don't know where it went?

A. I presume he did; certainly he must have as a practicing physician.

Q. But you never kept a record of what your father did during his lifetime, did you?

A. No, sir.

Q. But you know that he kept records himself?

A. I have no definite knowledge of his records except I presume every reputable physician would keep records.

[Vol. 68] HARRY C. BECK, called as a witness on behalf of the government, being duly sworn, testified as follows:

Direct examination.

By Mr. Dunigan:

(Papers marked Government's Exhibits 9, 10 and 11 for identification.)

Q. Mr. Beck, what is your occupation?

A. Chief inspector and deputy of marriage licenses.

Q. Where are you located?

A. In the City Hall, Atlantic City.

Q. New Jersey?

A. Yes, sir.

Q. I show you this book, Government's Exhibit 9 for

identification and ask you if you have ever seen that before?

A. Yes, sir; I brought it up from Atlantic City.

Q. Is that book a book kept in the regular course of business by the Department of Health at Atlantic City?

A. Yes, sir.

Q. I show you Government's Exhibits 10 and 11 for identification and ask you if you recognize those two sheets?

A. Yes, sir; they belong in that book.

Q. And you have seen them in that book before?

A. Yes, sir.

Mr. Dunigan: I offer in evidence Government's Exhibits 9, 10 and 11 for identification.

Mr. Fowler: No objection.

(Government's Exhibits 9, 10 and 11 for identification received in evidence and exhibited to the jury.)

Q. Mr. Beck, the two pages that the jury are examining, Government's Exhibits 10 and 11, came from the book Government's Exhibit 9, is that correct?

A. Yes, sir.

[fol. 69] Q. And to your knowledge they were removed from the book within the last month or so, is that correct?

A. Oh, yes, yes, sir.

Mr. Werner: One of the jurors has a question, Juror No. 4.

Juror No. 4: September 4th or 5th. (indicating on page of book).

By Mr. Dunigan:

Q. I show you Government's Exhibit 11 and I direct your attention to this September. What is that (indicating)?

A. It looks like September 4, '96, to me.

Q. '96?

A. Yes, sir.

Q. Mr. Beck, let me ask you this question: How long have you been connected with the Department of Health?

A. Forty years.

Q. What has the practice always been in the State of New Jersey, Mr. Beck, when a birth is reported to the local registrar?

A. Since 1912, a file is made and a copy sent to Trenton.

Previous to that, the original birth certificate was sent to Trenton.

Q. So that in 1896 when a birth was recorded with the local registrar, the original birth certificate was sent on to Trenton?

A. Sent to Trenton.

Q. Now what happens? What is the procedure, Mr. Beck, when an entry is made of a delayed birth report to the local registrar?

A. Well, if the doctor is living, you could get a certificate from the doctor, of course, and enter it in the book, and if not, an affidavit is taken before a Common Pleas judge to have it placed in there.

Q. And what happens to the book?

A. Well, the affidavit is sent to Trenton, the same as the other birth certificate.

[fol. 70] Q. Now, in the event that a delayed birth report record is made with the local registrar, is the date when it is made reflected in the register itself?

A. The registrar is supposed to put down the date received.

Q. So that the date that the delayed local report is received—

A. Would appear in the book.

Q. Mr. Beck, is this book, Government's Exhibit 9 in evidence, where is that kept in the office of the Department of Health?

A. We had a safe, and that book and another book was laid on top of the safe for several years, because there was not room in the safe to put them all in.

Q. In the course of the business in the Department of Health could an outsider come in and look at the book?

A. They could come in and request the date of a death or a marriage and have access to the book and look it over.

Q. Could they take it out into some other room?

A. Yes, sir; into the back room and look them over.

Q. By themselves?

A. Yes, sir; it has been one. Sometimes attorneys or different ones come to look at the book.

Q. Who had supervision over these books in the Department of Health?

A. Mr. Alfred T. Glenn for a number of years.

Q. How long has he been connected with the Department of Health?

A. He was there longer than I, 50 years. He retired on a pension on the 1st of December.

Q. Last year?

A. He has been sick or an invalid.

Q. And he is sick now?

A. Yes, sir.

Mr. Dunigan: All right.

Cross-examination.

By Mr. Fowler:

Q. You have seen Mr. Glenn's handwriting?

A. I have seen it at different times; yes, sir.

Q. Would you say that (indicating) was signed by Mr. Glenn?

A. That is his signature; "Dr. Salasin, Health Officer," [fol. 71] with his signature, as a stamp record in his office—

Mr. Dunigan: Let me see it, please.

(Mr. Fowler shows to Mr. Dunigan.)

Mr. Werner: This exhibit that has been offered, it has no number yet, certifies a true and correct transcript of the records of births. On the other hand, the certification attached to this paper, either does not refer to it or is erroneous, because it shows the certification of copy of birth certificate, and this is not a copy of a birth certificate but merely a transcript of the record of births at Atlantic City, and not a copy of birth certificate.

Mr. Fowler: The offer is made on the representation last night that when the original arrived I could substitute the original without any trouble for the photostat. I said I didn't care much about the promise.

I am making this offer on the witness's identification of Mr. Glenn's handwriting, his own signature, signed in the course of business. I offer the paper for whatever it is. I am not describing it. It is for the jury to say what that paper would mean and what meaning it would convey to anybody who secured it.

Mr. Dunigan: We have no objection to the extract showing it is a record of births.

The Court: I will take it.

Mr. Fowler: We have just received by telephone—

Mr. Werner: Wait a minute.

Mr. Fowler: I want to explain further. I cannot go any further, because you have got the book.

The Court: I will admit it in evidence.

[fol. 72] (Marked Defendant's Exhibit C)

Q. Now, what position did Mr. Glenn hold in the Department of Health of Atlantic City?

A. He was Registrar of Vital Statistics and clerk.

Q. He was the head of the Bureau of Vital Statistics, was he, in July of 1936?

A. He was in charge of that department; yes, sir.

Q. And the records were kept by him?

A. In 1936?

Q. I am talking about July, 1936.

A. Yes, sir; he was there then.

Q. The records were under his supervision and in his care; is that right?

A. Yes, sir.

Q. You say he was there for 50 years?

A. About that; yes, sir.

Q. This birth register, that was a record regularly kept by him?

A. Well, I don't say whether he done all the writing in it the years before the Board of Health was a board. It is now under a commission. Now there are different secretaries. I don't say that Mr. Glenn done all that handwriting there because there is different writing.

Q. Well, 1896, we can assume that is 44 years ago, and you say he held that position for 50 years, about?

A. I was not there until 1899.

Q. As a matter of personal knowledge, you don't know who had charge of the birth certificates, the birth register, in 1896?

A. No, sir.

Q. You know that Mr. Glenn was in charge of the office then?

A. To the best of my knowledge, he was still there in 1896.

Q. When a request is received by your department for the record of a birth, before you issue any certificate on that, what is your custom; what do you do?

A. It must be taken off the birth certificate or off of the book.

Q. It must be taken off the birth certificate in your office; isn't that right?

A. Yes, sir.

[fol. 73] Mr. Dunigan: I don't think that is all what the witness said.

The Court: He said "or off of the book."

The Witness: Or off a birth certificate; make a copy.

Q. You never look for any certificate that is signed by a doctor certifying a birth before you issue a certificate?

A. They have to look to see who the doctor is.

Q. You are familiar with the form of certificate issued?

A. Yes, sir.

Q. To anybody asking for one, aren't you?

A. Yes, sir, I am familiar with the form.

Q. Will you look at Defendant's Exhibit C, where it says "Certificate signed by A. W. Bailey, M. D."; that is in the body of the certificate. That was signed by Mr. Glenn, wasn't it?

A. That is the certificate. Yes, it is signed by Mr. Glenn, stamped "Dr. Salasin."

Q. That is in there?

A. Dr. A. W. Bailey. Dr. A. W. Bailey was at one time a member of the Board of Health, but he has not been in Atlantic City for 20 years; possibly. He is dead 10 years.

Q. His son said that he had been dead about a year.

A. I don't know how long he has been dead. He originally went up to Wernersville and had charge of some institution there.

Q. You can look at Government's Exhibit 9, this birth register, but you would not find any certificate from a physician on that record, would you?

A. No, sir.

Q. Do you recognize the handwriting of we will say the first 10 entries on page 164, the birth register of your city?

A. I cannot say.

Q. Is that Mr. Glenn's handwriting (indicating)?

A. I cannot say that it is. I don't know that signature (indicating).

[fol. 74] Q. Mr. Glenn was a careful man, wasn't he, in the performance of his duties?

A. As far as I know of; yes, sir.

Q. And if a request was received for a certificate or a

record of birth out there, he would examine this very book and these pages, wouldn't he, to get the name of Wiener?

A. He would have to examine the book before making out a copy.

Q. And then, and not until then, would he find a certificate like Defendant's Exhibit C?

A. Not until he found a copy in the book.

Q. Where was this book kept?

A. Well, sometimes, as I said, in the safe——

Q. Wait until I fix a time. Where was this book kept in the year of 1933?

A. I judge it was in the safe at that time.

Q. Where was it kept in 1934?

A. I judge it was still in there up to several years ago.

Q. And in 1935?

A. Well, it might have been on the outside of the safe that year and later; I couldn't state. They were sent out one time to be remodeled or rebound, and when they came back they made two books out of one, and there was not room for them in the safe, to put them in.

Q. Do you know what volumes they were?

A. There is one there yet, from 1918.

Q. From 1918 on?

A. Up to 1918.

Q. Was it the volume just prior to 1918 that was rebound?

A. That one there was not rebound (indicating). This is one of the books that was rebound (indicating).

Q. When was it rebound?

A. I couldn't give you the year that went to the Commissioner; Commissioner Kuehnle had them sent out to be rebound.

Q. Several years ago, try to fix the time. How many?

A. I judge it is more than five.

Q. And then when they came back rebound, where were they kept?

A. In the safe; all except a couple of them that we could not get in there.

[fol. 75] Q. From 1935 on the book was in the safe?

A. Up to then I judge it was.

Q. When it came back from the rebinders in 1935, you told me it was kept in the safe?

A. No; there was not room in the safe, when they all came back.

Q. When it came back from the rebinders, it was no longer kept in the safe?

A. It was put on top of the safe with other books; probably that was in the safe some time (indicating) and another one.

Q. What occasion did you have to notice what book was on top of the safe?

A. Because we see them every day.

Q. And every day you saw them, this Government's Exhibit 9, the register from 1888 to 1896 was on top of the safe?

A. I made no record of that.

Q. You don't know as a matter of fact what book was in the safe and what book was not?

A. Positively I know that book was up there, but I couldn't say when.

Q. Fix a time.

A. I know several years or so.

Q. Give me a year.

A. I don't know the exact year.

Q. You know positively that it was there?

A. It has been two or three years ago.

Q. Before you can tell us positively that it was on top of the safe, isn't it a fair assumption that you would have to remember when that was?

A. I don't know the exact date.

Q. Still you say you know positively it was?

A. On the safe at different times.

Q. Did you talk this matter over with the District Attorney?

A. I was in the District Attorney's office.

Q. You made that observation to him in the course of your talk?

A. Yes, sir; I did.

Q. Did he ask you where they were kept in the course of that talk?

A. I believe he did.

Q. Did he ask you if it were possible that they were out of the safe?

A. I don't remember him asking that.

[fol. 76] Q. How did that question ever come up?

A. I mentioned the question that they were out of the safe, that the books, some were on top of the safe.

Q. What put that in your mind?

A. Because I knew they were there.

Q. You knew this specific book was out of the safe?

A. It had been.

Q. You cannot tell us when?

A. I cannot tell you the exact date. I was on the street for years and then back in the office two or three years when Mr. Glenn was sick.

Q. Surely, when you were out on the street, you didn't know where it was kept?

A. I could see it when I came into the office.

Q. When you came into the office, you made a mental note that this book was on the safe?

A. We were in the office, in and out, every day.

Mr. Dunigan: I object to that, your Honor.

The Court: Objection sustained.

Q. Now, these books are correctly kept, aren't they?

A. Yes, sir; as a general thing.

Q. They are your city records and they have got to be correct; isn't that right?

A. Yes, sir.

The Court: We will take a recess for a few minutes.

(Short informal recess.)

Q. Now, Mr. Beck, of course it is understood that you had nothing to do with the keeping of this Government's Exhibit 9 book, none?

A. No, sir.

Q. You made none of the entries?

A. Not in that book, to my knowledge.

Q. Have you looked through the book?

A. Yes, sir; I have seen the book.

[fol. 77] Q. Have you seen any other instances in this book, other than this page, No. 164, where different colored ink appears in a single entry as opposed to others?

A. I have not noticed any difference.

Q. Now will you just take this book and start looking at the pages of it as I call them off; I will just call off a few of them—

The Court: Show that to the jury. I don't think it is necessary to take the time to have this man read them, when the book is in evidence already.

Mr. Fowler: Can I call his attention to one or two?

The Court: It is in evidence now and you can show anything.

Mr. Fowler: Your Honor rules I can not show any of the entries?

The Court: It is taking time. You can show the jury it quite as well as showing it to the witness.

Mr. Fowler: I don't see how the jury can see it.

The Court: You can hold it up before them.

Mr. Fowler: Can I show them it as I question him?

The Court: Yes.

Mr. Fowler: All right, sir.

Q. Did you look at page 116—

Mr. Dunigan: Your Honor, we are going to object to his questioning the witness as to the ink in this book. If he wants to show it to the jury, it is all right.

Mr. Fowler: May I call the jurors' attention to it, your Honor?

The Court: Yes.

Mr. Fowler: Thank you.

I don't know that you gentlemen in the back row of the jurybox can see this, but I first call your attention to page [fol. 78] 7, and the entry there is under date of February 12, 1899, and the name Matilda Augusta appears before the last name Zeintzy, Matilda Augusta in different colored ink.

Mr. Werner: I don't think it is a proper time to argue now, Mr. Fowler.

Mr. Fowler: I show you page 94—

Mr. Dunigan: What is the entry?

Mr. Fowler: The last entry on the page, October 8, 1911. Date of birth, April 9, 1891, and that was registered October 28, 1911, Florence Lane Johnston, registered October 28, 1911.

Q. What do you say happened in the case of a birth in 1891 that was not registered until 1911?

A. The only way they could do it would be to bring in a birth certificate, and if it had not been sent in at that time.

Q. Is there anything in the books for the 1911 register to show a certificate was presented say of an 1891 birth; is there any notation in the book?

A. That I don't know of that part.

Mr. Fowler: Is it conceded October 28th showing it was done, a certificate showing a late entry?

There is no entry anywhere under any heading Florence Kane Johnston, birth, April, 1891. It was not registered until October, 1911, showing it was registered by a certificate. It appears like any other entry. I am asking you to concede that is what the book entry shows.

Mr. Dunigan: Point it out to the jury.

Mr. Fowler: All right (exhibiting to jury).

I have several others. Will you stay with me for a few moments. Page 102. The name of Louise Zipp Cook, registered October 31, 1938, and the birth of that lady was [fol. 79] January 29, 1892, and there is nothing in the registration to show that it was done by certificate. This is a late registration by the date. This registration has got the same date (indicating). This registration (indicating) is made September 14th as a late registration. The birth, October 5th—

Mr. Werner: Are you going to sum up to the jury or are you going to wait until the proper time to do so?

Mr. Foyler: I am answering an injury by one of the jurors.

Now we turn to page 106, and we find in red ink Irwin A. Marks, Jr., correcting an entry of Irwin D. Son. That was registered July 5, 1922, and the birth was June 26th.

Now, 108, date of August 16, 1892, on the bottom of the register here is a different ink than any ink on the page.

Mr. Dunigan: What was the entry on page 108?

Mr. Fowler: 16-92.

Mr. Dunigan: The name?

Mr. Fowler: William Allen Belt.

Mr. Dunigan: Your Honor, I wish you would instruct counsel to point out these entries only to the jury and not to make remarks about them and explain them.

The Court: Yes; just point them out.

Mr. Fowler: I point out the name Emily Math on page 110, before the last name Friards. The names Emily and the other name are in different colored ink.

The Court: Just do not make explanations about it.

Mr. Fowler: I beg your pardon.

Page 116.

Mr. Dunigan: When was that registered?

Mr. Fowler: November 24, 1922, and the two names following, Elizabeth Zimmerman.

[fol. 80] By Mr. Werner:

Q. Is this the book that was in and out of the safe, Mr. Beck?

A. Yes, sir.

Mr. Fowler: Now I call your attention to page 116, the name J. Willetts in a different ink—

Mr. Dunigan: I object to that, your Honor.

The Court: Yes; just call attention to the items you wish and make no explanations or remarks about them.

Mr. Fowler: The item J. Mills May 18, 1893. Page 120, the name James Sheridan Brown under date of September 14, 1893.

Mr. Werner: Is that a birth?

Mr. Fowler: It is a birth August 24, 1893.

Page 132, the names Everett Remington, registered July 18, 1894. The names Everett Remington appearing before the last name Hutchins.

136, the name Thomas appearing under the entry of Thomas Bradley, November 14th, 1894; and the names of John George before the name Frings, registered November 18, 1894.

Page 141, the first name, James Joseph Quinn, registered December 17, 1928.

The Court: I think that is enough now. You have shown quite a number there. Let us get through with this witness so he can go home for the holiday.

By Mr. Fowler:

Q. These records are accurate, aren't they, sir?

A. To the best of my knowledge.

Q. I call your attention to Government's Exhibit 10, and your specific attention to the dates of birth as compared with the dates they were registered. Is it a fact that all of the [fol. 81] names entered on that page 164 purport to have been entered September 14, 1896?

A. That I couldn't say.

Q. Look at the exhibit.

A. I couldn't say when they were registered. Sometimes the dates are registered—whether they are all registered on that date I couldn't say; but whoever wrote them down has made a ditto and it looks as if they were made that date.

Q. I call your attention to the registration of Lionel Stockton Figley, registered as having been born September

16th and the registry of birth registered September 14th. I call your attention to Bertha Perley, whose date appeared September 22nd, the date of birth, and is registered September 14th. I call your attention—

The Court: We are just wasting time here. This man was not in the office at that date.

Mr. Fowler: May I call it to the jury's attention?

The Court: Yes, but let's get through with this.

Mr. Fowler: I show you this entry. He was born September 14th—

Q. You still say these records are accurate, sir?

Mr. Dunigan: That is objected to.

The Court: He said to the best of his knowledge.

Redirect examination.

By Mr. Dunigan:

Q. You tell us that when a record was made of a particular birth reported the date it was actually made was shown?

A. It should be, but years ago there was a lot of them that had no date.

Q. I show you this paper, Defendant's Exhibit C, and ask you—do you see this (indicating)?

A. Yes, sir.

Q. Now, that is only a certification of the record on file in your office, is it not?

A. Yes, sir.

Q. Now—

[fol. 82] Mr. Fowler: I object to counsel not only leading but instructing the witness.

The Court: It shows on its face what it is.

Q. A birth certificate, if one ever existed in this case, would be on file in Trenton?

Mr. Fowler: Objected to as leading.

The Court: That is what the man said yesterday.

Recross-examination.

By Mr. Fowler:

Q. Do you know whether the law was observed in this case?

A. No, sir.

Q. Do you know as a matter of custom that names are entered on this birth register clear down to the last line before the page is turned over?

A. I couldn't tell what lines they wrote on. I didn't write them.

Mr. Dunigan: That is objected to. This witness testified he had nothing to do with the entries in this book.

The Court: The objection is sustained. That is all. We will stand adjourned until 10:30 next Tuesday morning.

(Adjourned to Tuesday, February 13, 1940, at 10:30 A. M.)

New York, February 13, 1940,
10.30 a. m.

Trial Resumed

KINARD ABBOTT, called as a witness on behalf of the government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Werner:

Q. Mr. Abbott, what is your occupation?

A. I am a naturalization examiner.

[fol. 83] Q. For whom?

A. For the Immigration and Naturalization Service, United States Department of Labor.

Q. As such what do you do?

A. I investigate applications for citizenship.

Q. Have you produced here, Mr. Abbott, the re-entry permit file of one Welwel Warszower?

A. Yes, sir.

Q. Is that from the files of your office in the Department of Labor?

A. Yes, sir.

Q. What is a re-entry permit?

A. It is a document issued by the Commissioner of Immigration and Naturalization to any alien who is residing here and has been legally admitted for the purpose of facilitating the re-entry of the alien after foreign travel.

Q. Mr. Abbott, have you searched the departmental files to ascertain whether or not an application for naturaliza-

tion has been made by anyone in the name of Welwel Warszower, Robert Weiner, William Weiner, Robert Wiener and William Wiener?

A. Yes, I have.

Q. Was an application for naturalization ever made under any of those names?

A. No.

(No cross-examination.)

FRANK C. McPHERSON, called as a witness on behalf of the government, being duly sworn, testified as follows:

Direct examination.

By Mr. Werner:

Q. Mr. McPherson, what is your occupation?

A. I am an immigration inspection officer.

Q. How long have you been such?

A. Ten years.

Q. Just what are your duties as an immigration inspector?

A. I am an inspector in charge of re-entry permits.

Q. Just what does that embrace?

A. Accepting applications for permits and the delivery of permits.

[fol. 84] Q. Will you explain to his Honor and the jury just what the procedure is for getting a re-entry permit?

A. Re-entry permits are issued to aliens who have been previously legally admitted for permanent residence in the United States. They must apply for an application for re-entry permit on form 631. They must appear in person before an immigration officer and the immigration officer checks the application and the photograph submitted by the applicant, and the applicant accompanies it with money order of \$3. He is then requested to sign the photograph and the application before the inspector and is sworn in. Then a form, a request for verification of arrival is sent to the port of arrival, and after the record has been found a verification is sent direct to the central office. There it is reviewed with the application and compared with the application, and if found to relate a permit is issued by the Commissioner. Then the permit is forwarded to the office

indicated on the back of the application and the applicant is notified by postal card to call in person. When the applicant calls at the office he is identified by the examining officer and requested to sign his permit.

Q. How is he identified?

A. By his passport or some other means of identification.

Q. By a passport?

A. Sometimes.

Q. Is that by a United States passport?

A. Oh, no; he is a non-citizen. And when the issuing officer is satisfied that the permit belongs to the man, he is asked to sign his name partially on the photograph and partially on the form.

Q. Form 631 is filled out first?

A. Yes, sir.

Q. Is this such a form as you refer to?

A. That is right.

Mr. Werner: This is Government's Exhibit 13 for identification. I offer it in evidence.

(Government's) Exhibit 13 for identification received in evidence.)

(Mr. Werner read Exhibit 13 to the jury.)

[fol. 85] Q. Mr. McPherson, there are certain writings in pen on here. Do you know who wrote them; are you familiar with that handwriting?

A. Yes, sir, I do.

Q. Whose handwriting is it?

A. Inspector Jeannisson's.

Q. Is Inspector Jeannisson with the Service still?

A. No; he retired in April, 1934, and he is now deceased.

(Mr. Werner continued the reading of Exhibit 13 to the jury.)

Q. Now, Mr. McPherson, can you state the practice of the re-entry permit division with respect to writing on the application for re-entry permit when the question is not fully answered?

Mr. Fowler: I object to that. We are concerned with the time that was made, not some other time.

Q. At the time Government's Exhibit 13 was made.

A. The examining inspector checks the application and if there are any omissions or errors he corrects them.

Q. In the presence of the applicant?

A. In the presence of the applicant.

Q. The inspector checks them as to the accuracy and truth of the statement?

A. That is right.

Q. I call your attention to the fact that Welwel Warszower is signed twice. Can you tell what that indicates?

A. That indicates that when the applicant appeared the application was signed and the inspector had him sign it again to make sure it was his signature.

Q. I call your attention to the photograph. Is that one of the photographs that was clipped to it?

A. Yes, sir.

Q. Must the applicant sign his name on that photograph in the presence of the immigration inspector?

A. That is correct.

[fol. 86] Q. At the time Exhibit 13 is filled out is a request for the certificate of arrival made out?

A. Yes, sir.

Q. Where is that addressed?

A. To the Port of Arrival indicated on the application.

Q. Is Government's Exhibit 14 for identification such a request?

A. That is right.

Q. And that is sent out at the place where the re-entry application is made?

A. Yes, sir.

Mr. Werner: I offer Exhibit 14 for identification in evidence.

(Government's Exhibit 14 for identification received in evidence and read to the jury by Mr. Werner.)

Q. Now, Mr. McPherson, I call your attention to the fact that on Government's Exhibit 14 it is stated "Shows inspection card S. S. Haverford." What does that indicate?

A. That indicates that when the applicant appeared with his application for a permit he had his inspection card which was issued to him at the time he entered the country in 1914.

Q. Thereafter, Mr. McPherson, and I show you Government's Exhibit- 12 and 15 for identification, was a re-entry permit issued to this alien?

A. It was.

Q. And can you state where that re-entry permit was sent?

A. It was sent to the Barge Office in New York City.

Q. And is Government's Exhibit 12 for identification the re-entry permit?

A. It is.

Q. And you stated before, Mr. McPherson, that the alien is sent a card to notify him that the re-entry permit has arrived. Is Government's Exhibit 17 for identification the card in this case?

A. It is.

Q. You say that card is surrendered to you when the alien calls for his re-entry permit?

A. Yes, sir.

Q. And must he call in person?

A. He must call in person and present that card in order to get his permit.

[fol. 87] Q. And is a receipt for the permit then signed?

A. Yes, sir, it is.

Q. Is Government's Exhibit 15 for identification such a receipt?

A. Yes, sir.

(Mr. Werner showed papers to defendant's counsel.)

Mr. Werner: I offer in evidence Government's Exhibit 12 for identification, Government's Exhibit 15 for identification and Government's Exhibit 17 for identification.

(Government's Exhibits 12, 15 and 17 for identification received in evidence and Mr. Werner read Government's Exhibit 17 to the jury.)

Q. I call your attention to certain numbers appearing in the lower righthand corner of Government's Exhibit 17 for identification: Can you state what those are?

A. Yes, sir. The 298 is the sheet on which we get the signature for the permit. Government's Exhibit,—what is that, 17?

Q. Government's Exhibit 15.

A. 15, that should be sheet 298. March 19, 1932, is the date the permit was issued to him at the Barge Office. 79494 is the number of the re-entry permit. 3.16.32 is the day that the permit was issued in Washington, and F. C. M. is my initials. I delivered the permit.

Q. Frank C. McPherson?

A. Yes, sir.

(Mr. Werner continued the reading of Government's Exhibit 17 to the jury.)

Q. This Government's Exhibit 17, was surrendered to you at the time the re-entry permit was picked up by the alien?

A. That is correct.

Q. Is Government's Exhibit 12 the re-entry permit that was picked up by him?

A. It is.

[fol. 88] Q. Is Government's Exhibit 15 in evidence the receipt that was received from the alien at the time he presented the card and picked up the re-entry permit?

A. Yes, sir.

Q. And do your initials or name appear on Government's Exhibit 15 in evidence?

A. Yes, sir, my name.

Q. What does that indicate?

A. It indicates I was the delivering officer.

(Mr. Werner read Government's Exhibit 15 to the jury.)

Q. And is Government's Exhibit 12 in evidence the re-entry permit you delivered at that time?

A. It is.

Q. I call your attention to the name "Frank C. McPherson" written across the photograph. Will you explain to his Honor and the jury the circumstances of your writing that name?

A. Well, the regulations state that the delivering officer must sign his name partially on the photograph and partially on the permit before he hands it to the alien.

Q. I call your attention that Welwel Warszower is signed on the photograph. Can you state the time that was signed?

A. That was signed at the time he filed his application for the re-entry.

Q. I call your attention to the name Welwel Warszower written in ink on the permit itself. Can you state when that was written?

A. That was signed before me when I delivered the permit.

Q. That is followed by the Welwel Warszower again signed. It looks like indelible pencil writing.

A. That is signed by the officer who admits him from abroad—excuse me; that is signed before the office by the alien.

Q. Now I call your attention to the back of Exhibit 12 in evidence and ask you if you can state when and where this alien returned from abroad?

A. He returned through the Port of New York on the steamship Bremen June 5, 1932.

[fol. 89] Q. Can you state who the immigrant inspector was who admitted him?

A. Inspector Stern.

Q. Is Inspector Stern with the Department of Labor?

A. No, he is deceased.

Q. Have you ever seen Inspector Stern write?

A. Yes, sir.

Q. Is this his signature (showing paper to witness)?

A. Yes, sir.

Q. Appearing on Government's Exhibit 12 in evidence?

A. Yes, sir.

(Mr. Werner read Government's Exhibit 12 to the jury.)

Q. At the time that the alien picks up his re-entry permit is the photograph compared with the person who appears?

A. It is.

Q. And at the time the alien re-enters the United States—question withdrawn. At the time the alien first signs the re-entry permit is the signature on the re-entry permit compared with the signature previously made on the photograph?

A. Yes, sir.

Q. And at the time that the alien re-enters the United States is the signature previously made on the re-entry permit compared with the new signature that must be made in the presence of the immigrant inspector?

A. That is correct.

Q. And at that time is the photograph compared with the re-entering alien?

A. Yes, sir.

Q. May a re-entry permit be issued to a United States citizen under the laws of the United States?

A. No, sir.

Mr. Werner: That is all.

Cross-examination.

By Mr. Fowler:

Q. I understand, Mr. McPherson, you are familiar with the receipt of applications for the re-entry permits?

A. Yes, sir.

[fol. 90] Q. That indeed is your business, isn't it?

A. Yes, sir.

Q. And it was your business in 1932?

A. Yes, sir.

Q. You told us of the custom that was followed in the making out of the applications, is that right?

A. Yes, sir.

Q. That if the applicant failed to fill in any spaces the inspector would check and call his attention to it and have the applicant fill it in?

A. The inspector usually fills them in.

Q. Didn't you testify on your direct examination that the inspector would call the applicant's attention to the empty spaces and have the applicant fill them in; didn't you state that?

A. If I said that I made a mistake.

The Court: I understood him to state that he filled them in in the presence of the applicant.

The Witness: That is correct. That is what I said.

Q. You say now you testified on direct that the inspector filled them in in the presence of the applicant, is that what you say you testified to?

A. That is what I should have testified to.

Q. There are no checks on Government's Exhibit 13 here, made by this Inspector Jeannisson, made at blank spaces there, are there?

A. No, there are not.

Q. But there are blank spaces filled in, in what you know to be Inspector Jeannisson's handwriting, is that right?

A. That is right.

Q. Where is Inspector Jeannisson now?

A. He is dead.

Q. When did he die?

A. Some time last year.

Q. Did you prepare this re-entry permit?

A. Prepare it?

Q. Yes.

A. I delivered it.

Q. Did you prepare Government's Exhibit 12?

A. No, I didn't prepare it; I delivered it to the applicant.

Q. You checked it over, didn't you, to see it was all right?

A. I checked it over to see his photograph and his signature and if he was the man entitled to it.

[fol. 91] Q. And to find that out you would have to look up his age, find out how old he was?

A. We asked him how old he was.

Q. How old was he when you gave him that?

A. 38.

Q. That was 1932. That makes him born in 1894; that makes him 20 years old when he entered the country.

Mr. Werner: I think that is purely a question of arithmetic.

Q. You did check back his age, didn't you?

A. That is correct.

Q. To see if that was the right fellow?

A. Yes, sir, that is correct.

Mr. Fowler: I think that is all.

Redirect examination.

By Mr. Werner:

Q. You just took the alien's age as he gave it to you?

A. Yes, sir.

Mr. Fowler: I object to counsel testifying.

Q. Will you answer the question?

Mr. Fowler: I am objecting.

The Court: Do you know anything about what he told you?

The Witness: I asked him how old he is and he said 38. I give it to him; if it is not, I send it back to Washington for correction.

Q. If it is not true you don't know that?

A. No.

Mr. Fowler: I object to that.

The Court: That is what he said.

Q. I show you Government's Exhibit 12 in evidence, the re-entry permit, and ask you if you know where that was [fol. 92] prepared?

A. It was prepared in Washington, the central office.

By Mr. Fowler:

Q. You said to his Honor you ask the man how old he is and if what he says is correct as checked by the permit you give it back to him?

A. Yes, sir.

Mr. Fowler: That is all.

(Witness excused.)

NICHOLAS A. LOUGHLIN, called as a witness on behalf of the government, being duly sworn, testified as follows:

Direct examination.

By Mr. Werner:

Q. Mr. Loughlin, what is your occupation?

A. Customs inspector.

Q. And were you such on June 5, 1932?

A. I was.

Mr. Werner: I ask that this be marked for identification.

(Marked Government's Exhibit 18 for identification.)

Q. What are your duties as customs inspector?

A. To examine baggage, pass cargo, et cetera.

Q. I show you Government's Exhibit 18 for identification and ask if that is a declaration made before you on June 5, 1932?

A. Yes, sir, that is.

Q. Did you make the inspection in that case?

A. I did.

(Mr. Werner shows to defendant's counsel.)

Mr. Werner: I offer Government's Exhibit 18 for identification in evidence.

[fol. 93] (Government's Exhibit 18 for identification received in evidence.)

Q. Mr. Loughlin, do you follow an invariable procedure when examining baggage?

A. I do.

Q. Can you state to his Honor and the jury what that procedure is?

A. The passenger in this case, particularly in this case, this particular case, a third class passenger, who presents his declaration on the pier. We then have the passenger acknowledge his signature and proceed with the examination of the baggage.

Q. Can you state from your examination of Government's Exhibit 18 in evidence on what ship the passenger returned?

A. On the Bremen.

Q. Is there any writing by you, Mr. Loughlin, on the face of Government's Exhibit 18 in evidence?

A. No.

Q. Is there any writing by you on the reverse of Government's Exhibit 18 in evidence?

A. Yes, sir.

Q. Will you explain to his Honor and the jury what that writing is and what it indicates?

A. The writing here has the label numbers which we affixed to the baggage, the date and my signature.

Q. Will you state whether or not that passenger acknowledged his signature before you?

A. He did.

Q. You always do that?

A. I always do that.

Mr. Werner: May I read this to the jury, your Honor?

The Court: Yes.

(Government's Exhibit 18 read to the jury.)

Mr. Werner: That is all.

Mr. Fowler: No questions.

(Witness excused.)

[fol. 94] MAX BEDACHT, called as a witness on behalf of the government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Werner:

Q. Mr. Bedacht, what is your occupation?

A. I am national secretary of the International Workers Order.

Q. Do you know the defendant in this case?

A. I do.

Q. The gentleman sitting third from the end of this table here, with glasses; is that the gentleman you mean?

A. Yes, sir.

Mr. Werner: Indicating the defendant Warszower.

Q. How long have you known him?

A. Oh, around 12 or 15 years.

Q. And have you been closely associated with him during that time?

A. For the last seven years.

Q. Where did you meet him?

A. I do not know when and where I met him first.

Q. We will put it this way: Have you ever seen him in Detroit? Is that where you first met him?

A. Probably.

Q. And was he associated with you out there at that time?

A. Not in my particular work.

Q. In the course of your particular work did you see him regularly?

A. Well, I saw him off and on.

Q. And did he ever tell you his name, Mr. Bedacht?

A. Yes, sir.

Q. What name did he tell you was his name?

A. William Weiner.

Q. Have you ever heard him use any other name?

A. Never.

Q. Has he ever told you that his name was Robert William Weiner?

A. I don't remember the name Robert.

Q. Has he ever told you his name was Robert William Wiener?

A. Well, some called him Wiener and some called him Weiner.

[fol. 95] Q. And did he ever make any comment on that?

A. No.

Q. Have you seen him write from time to time, Mr. Bedacht?

A. Yes, sir.

Q. I show you a passport application in the name of Robert William Wiener, Government's Exhibit 1 in evidence, and I call your attention to the signature and ask you if you know whose signature that is?

A. It looks like Mr. Wiener's.

Q. Have you ever seen him sign the name Robert before?

A. I may have; I have no recollection of it.

Q. Has he been known to you as Robert or William Weiner?

A. He was known to me as William Wiener.

Q. I show you Government's Exhibit 12, a re-entry permit in the name of Welwel Warszower, and ask you if you know the picture that appears on that?

A. It may be a picture of Mr. Wiener.

Q. Is it?

A. I don't know; I was not there when it was taken.

Q. That is your best opinion in 1932?

A. Yes, sir.

Q. Does that look like he looked in 1932?

A. It looks like Mr. Wiener.

Q. Had you ever seen the picture of Welwel Warszower before this case arose?

A. Never saw it or heard of it.

Cross-examination.

By Mr. Fowler:

Q. Just fix the time when you say you knew the defendant in Detroit, what year or years?

A. Well, I can not exactly say that I did know him in Detroit, but it is probable. I came around a bit; it may have been in Detroit or it may have been in Chicago.

Q. Can you fix the time? Did you know the defendant lived in Detroit at one time?

A. Yes, sir, I know that.

Q. Fix that time.

A. That was before '30; it must have been before 1929.

Q. You knew him then as Weiner or Wiener?

A. Yes, sir, I knew him then.

[fol. 96] By Mr. Werner:

Q. By the way, do you know whether the defendant went to Europe in 1932?

A. I do not know of my knowledge at any rate.

Q. Not of your own knowledge?

A. No.

Mr. Werner: Thank you.

(Witness excused.)

CHARLES REISS, called as a witness on behalf of the government, being duly sworn, testified as follows:

Direct examination.

By Mr. Werner:

Q. Mr. Reiss, what is your occupation?

A. Immigration Inspector.

Q. In the United States Department of Labor?

A. Yes, sir.

Q. How long have you been such?

A. Since 1910.

Q. Where have you been an immigrant inspector?

A. Philadelphia station, headquarters Gloucester City, New Jersey.

Q. Will you keep your voice up? What are your duties, Mr. Reiss?

A. Inspecting aliens coming into the country.

Q. When an alien comes into the country for the first time, Mr. Reiss—question withdrawn. When an alien came into the country for the first time in 1914, was an invariable procedure followed?

A. Well, he was listed on the manifest and examined at the time the ship arrived.

Q. When you say listed on the manifest, what do you mean?

A. The passenger manifest, giving a description of the alien.

[fol. 97] Q. And by whom is that done?

A. It is supposed to be handed in by the steamship company and the master certifies to it and the surgeon-physician.

Q. And after you receive the manifest—when I say you, I mean the immigration inspection station—then what is done with it?

A. Well, the aliens are passed up onto the examination floor and sorted out according to the manifest and run in tiers, in benches, before the inspector, who has the manifest on which they are manifested.

Q. And are the answers given on the manifest checked with the alien personally?

A. Yes, sir, they are all supposed to be checked.

Q. And if the statements of the alien agree with the statements on the manifest, was the alien then passed?

A. Yes, usually.

Q. Now I show you Government's Exhibit 19 for identification and ask you if that is a volume of such manifests?

A. Yes, sir, that is a bound volume of manifests.

Q. And what manifests does Government's Exhibit 19 for identification cover?

A. March 7, 1914, to March 31, 1914.

Q. At what port?

A. The Port of Philadelphia.

Mr. Fowler: If your Honor please, I am objecting to this offer of the district attorney as to his statement about the re-entry permits. Those documents bear the hand writing of this defendant, no question about that; I conceded that in the opening. I have conceded that. Now they offer an entry not made by this defendant. We don't know whom it was made by.

The Court: What is this book?

The Witness: The ship's manifest of aliens' arrival.

Mr. Fowler: The district attorney already has the defendant's own statement. Just why should we clutter up the record with this?

The Court: It is part of the system by which the government keeps track of aliens coming into the country.

[fol. 98] Mr. Fowler: I object to it as incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Fowler: Exception.

(Government's Exhibit 19 for identification received in evidence.)

Q. Does Government's Exhibit 19 in evidence, Mr. Reiss, contain the manifest of aliens arriving on the S.S. Haverford from Liverpool, at Philadelphia, on March 27, 1914?

A. Yes, sir, it does.

Q. Were you present at the time that ship landed?

A. Yes, sir; I was the boarding officer. I swore the captain and the surgeon-physician to the manifest.

Q. I call your attention to the name of Warszower, Welwel—

Mr. Fowler: Your Honor, the same objection goes to all of this.

The Court: Yes.

Mr. Fowler: Exception.

Q. (Continued.) I call your attention to the name, Warszower, family name; given name, Welwel, appearing on the manifest and ask you if you are the immigrant inspector who examined that immigrant?

A. No, sir, I was not.

Q. Do you know who did examine him?

A. Michael A. Levy.

Q. And is Mr. Levy still with the Department of Labor?

A. He was killed in a jitney accident in Atlantic City in August of 1916.

Q. I call your attention that above the alien's name appears the stamp "March 8, 1932, 4734/592 on 502 (R. P.)" Will you explain to his Honor and the jury what that indicates.

A. That indicates that we got a request for a verification of this man's arrival, pursuant to this application for a re-[fol. 99] entry permit, and that was furnished to the Department direct on our form 505.

Q. I show you Government's Exhibit 14 in evidence and ask you if that is the request you got from the Department that you refer to?

A. I could not say that, because I was not the man who handled it.

Q. Is there a record made in the regular course of business, is that such a request?

A. That request is made up at the time the application is made by the alien.

Q. That is sent to the port of entry?

A. That is if the man arrived before 1924.

Q. I show you Government's Exhibit 16 for identification and Government's Exhibit 20 for identification and ask you if they are verifications of the arrival?

A. Yes, sir.

Q. Of that alien?

A. Yes, sir.

Q. Such as referred to by you?

A. Yes, sir. This is a carbon copy. That would be exactly the same as the original.

Q. The carbon copy is Government's Exhibit 20 and the original is Government's Exhibit 16?

A. That is our file record copy.

Q. That is, Government's Exhibit 20 is your file record copy?

A. Yes, sir.

Mr. Fowler: Your Honor, I object to the double offer. It is unnecessarily burdening this record. Either one of these is incompetent enough. I object to the doubling of the incompetency.

The Court: I will take it as a government record as of his history.

Mr. Fowler: I have conceded the defendant's arrival in Philadelphia. Why all this performance I can not understand. I object to it as incompetent, irrelevant and immaterial, already covered and already conceded.

Mr. Werner: May I move to strike out Mr. Fowler's characterization of this trial as a "performance."

[fol. 100] Mr. Fowler: I don't characterize the whole trial. Just this one part.

Mr. Werner: I move to strike out his characterization, your Honor.

The Court: Do not do that again, Mr. Fowler.

(Government's Exhibits 16 and 20 for identification received in evidence.)

Q. Government's Exhibit 20 you have referred to as a carbon copy. Is that kept in your files in Philadelphia?

A. Yes, sir.

Q. And the original is sent down to Washington, D. C. for the issuance of the permit, Government's Exhibit 16?

A. Yes, sir, but accompanied by the request.

(Mr. Werner read Government's Exhibit 16 to the jury.)

Q. Is there a page on which the Welwel Warszower arrival is marked as manifest one?

A. Manifest record E, and the line on which he is listed is No. 1.

(Mr. Werner continued the reading of Exhibit 16 to the jury.)

Q. Examined by Inspector Reiss. Did you examine this alien?

A. No, sir.

Q. You were the boarding officer?

A. I was the boarding officer.

Q. And Mr. Levy who examined him is deceased?

A. Yes, sir.

(Mr. Werner read Government's Exhibit 19 to the jury.)

Mr. Werner: That is all, Mr. Reiss.

[fol. 101] Cross-examination.

By Mr. Fowler:

Q. Who made that entry, the first entry on that page of the manifest in evidence, now Government's Exhibit 19, do you know?

A. No, we would not know that.

Q. You don't know where he got his information, do you?

A. Well, they get the information, whoever makes it up, the steamship company or the master of the ship.

Q. From your knowledge you don't know where he got the information?

A. No, not in that case.

Q. What becomes of that manifest when the Haverford reaches Philadelphia?

A. It is turned over to the officer in charge of the examination, and he hands it to the different inspectors who are supposed to examine the aliens as they come along.

Q. After the examination where does the manifest go?

A. Back to the officer in charge.

Q. Of the ship?

A. No; the immigration officer in charge.

Q. Where does it go after that, where is it filed?

A. At the present time filed in Gloucester City, New Jersey, in headquarters, District 4.

Q. When these aliens arrive here, before they get off the ship, they sign something?

A. No, sir, not with us.

Q. Don't you make them register at all?

A. No writing; just interrogated as to the correctness of the manifest.

Q. Then you don't keep any record that the alien himself makes?

A. Not at that time.

Q. You rely on the record of that alien that someone else makes?

A. Not at that time when that alien arrived. They do now.

Q. They do now?

A. Yes, sir.

Q. Since 1911 you have been examining passengers at ships and admitting them as citizens, admitting them or rejecting them as aliens, haven't you?

[fol. 102] A. I have not any authority to reject them. I can detain them for examination by a board, but I have admitted them.

Q. We will say detain them; if they don't satisfy you you detain them?

A. Detain them and send them before a board of special inquiry.

Q. Was there a time that your department was required to exact from American-born citizens that they show a passport to enter this country?

A. Well, since 1918.

Q. During the war, from 1918 to 1921, there was such a period, isn't that so?

A. There was a Passport Act in 1918.

Q. But after the war was over that act was repealed, wasn't it?

A. No, sir, not that I know of.

Q. Do you still state it is still in force?

A. Yes, sir.

Q. Do you say that American born citizens must exhibit a passport to enter the country today?

The Court: Sustained. He is not a lawyer.

Mr. Fowler: I have qualified him as an immigrant inspector, your Honor.

The Court: He can tell us what he does.

Q. You are familiar with the laws of the admission of citizens and aliens into the country?

A. Yes, sir.

Q. You have been since 1911?

A. Yes, sir.

Q. Worked at it steadily?

A. Yes, sir.

Q. Tell me do you say that an American born citizen must exhibit a passport to enter this country?

A. Not exactly.

The Court: The witness has testified that he had the power to detain a person for a board of inquiry.

Mr. Fowler: May I except to your Honor's ruling.

Q. Mr. Witness, do you require in the performance of your duty that an American born citizen exhibit to you a passport before you allow him to enter the country?

A. Not necessarily, no, sir.

[fol. 103] Q. What you require is that he identify himself as an American citizen, to your satisfaction?

A. Absolutely.

Q. He can use a birth certificate for that purpose?

A. If it is a valid birth certificate.

Q. You know valid birth certificates when you see them? Or, at least, you pass upon them?

A. If they are duly authenticated by the proper authority.

Q. Well, now, I show you Defendant's Exhibit C, and I just call your attention to the first page. If that first page were handed to you by a man, a passenger on a steamship, who was claiming to be an American born citizen, would you accept that as a birth certificate?

A. Yes, sir. I would not have anything else to controvert it.

Q. You would accept it?

A. Yes, sir.

Q. You would, wouldn't you? Wouldn't you, sir?

A. Yes sir.

Q. And you would let him in?

A. If I were satisfied he was a citizen I would have no further authority.

Q. And if he claimed to be a citizen and showed you that paper sealed and signed you would let him in?

A. Yes, I wouldn't have anything else to controvert it.

(Short recess.)

Redirect examination.

By Mr. Werner:

Q. I call your attention again to Defendant's Exhibit C, and ask you if that is the birth certificate, or a transcript from a record of births in the Atlantic City Department of Health?

Mr. Fowler: I object to that as calling for the witness's conclusion. It speaks for itself.

The Court: Yes, I sustain the objection.

Q. Now, Mr. Reiss, you say that the manifest was made up by somebody on the ship; is that correct?

[fol. 104] A. I don't know who makes them up on the ship. After the manifest—

Q. After the manifest is made up, are the questions then checked personally with the alien?

A. Yes sir.

Q. And if the answers on the manifest are found to vary from the answers given personally by the alien is the manifest then changed by the inspector?

A. Yes sir.

Mr. Fowler: I object to this as leading.

The Court: He may answer. He did not suggest the answer. Is that your practice?

The Witness: Yes sir; changed in red ink.

Q. Will you find the manifest which you have referred to, Mr. Reiss, and by examining it state if you can whether changes were made as the inspector talked to the alien.

A. There is one right there (indicating).

Q. Can you answer the question? Do you know what it was?

A. Yes, whether any changes.

Q. Yes.

A. Yes sir.

Q. Changes were made as the inspector talked to the alien?

A. The name was changed here.

Q. Was the amount of money changed from \$16 to \$19 that the alien brought with him?

A. Yes, sir.

Q. What does that indicate?

A. That indicates that when he arrived before the inspector he had \$19 in his possession, at the time he was talking to the inspector, and the inspector verified that and made the change.

Q. In each case the manifest is verified from the immigrant himself?

A. Absolutely; yes sir.

Q. Now one more question. You stated that when one claims to be an American citizen and comes before you, if he identifies himself as an American citizen and such identification is satisfactory you admit him?

A. Yes sir.

Q. Is one of the methods that may be used the presentation of a passport?

[fol. 105] Mr. Fowler: I object to this.

A. Yes sir.

The Court: He may answer.

Q. Is that the most common method?

A. It is; yes sir.

Recross-examination.

By Mr. Fowler:

Q. Did you talk to the District Attorney between the time you left the stand and the time you resumed the stand during the recess we just had?

A. You mean right now?

Q. Yes.

A. No sir.

Q. Did you talk to anybody from the District Attorney's office at all?

A. No sir.

Q. You did not?

A. No sir; I did not.

JOSEPH J. FITZGERALD, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination.

By Mr. Werner:

Q. Mr. Fitzgerald, what is your occupation?

A. I am an employee of the Adjutant-General's Office, a department of the War Department in Washington.

Q. How long have you been engaged as such?

A. Over 20 years.

Q. Are you familiar with the records maintained by the War Department?

A. Yes sir.

Q. Mr. Fitzgerald, can you tell his Honor and the jury briefly what the regulations were with respect to registration for the draft, what they provided?

Mr. Fowler: I will concede that this defendant—that any records this agent has with him in connection with the draft may go into evidence.

[fol. 106] Mr. Werner: I would like to read into the record the parts which we claim.

The Court: All right.

(Record produced by the witness marked Government's Exhibit 21.)

Mr. Werner: You will concede that Government's Exhibit 21 is the complete draft record of the defendant Warszower in this case?

Mr. Fowler: If the gentleman from the Department says so I will.

Mr. Werner: He doesn't know. It is the record of the defendant Warszower.

Mr. Fowler: If this witness will tell us what he has brought here are the Department's records of a man named Warszower I will concede that is this defendant.

Mr. Werner: This is the record of a man who gave his name as William Wiener.

Mr. Fowler: I will concede it. I will concede that this defendant gave his name as William Wiener for the purpose of the draft, and signed anything the War Department required him to sign.

Mr. Werner: This appears here both as "William Weiner" and "William Wiener." Does your concession cover that?

Mr. Fowler: Yes.

Mr. Werner: That it is the defendant's handwriting.

Mr. Fowler: You don't mind my looking at it?

Mr. Werner: Not at all.

Q. Now, Mr. Fitzgerald, certain parts of Exhibit 21 are covered by paper?

A. Yes, sir.

[fol. 107] Q. Will you explain why that is?

A. Under the Selective Service Act the questions bearing on dependency and physical conditions are considered confidential and cannot be disclosed without the permission of the registrant.

Q. Have you received any such permission from the registrant in this case?

A. No, sir.

Q. What age was the minimum age for registration for the draft?

A. The first registration was from 21 to 30, both inclusive.

Q. And for the questionnaire what was the minimum age?

A. 21.

Q. So that if you were under 21 at the time the draft came into effect you need not have registered?

A. No, sir.

Q. Need you have registered regardless of whether you were an alien or a citizen?

A. Yes, sir.

Q. An alien could if he chose claim exemption; is that correct?

A. Yes, sir.

Q. Can you state whether or not the individual in Government's Exhibit 21 claimed exemption?

A. Yes, sir.

Q. Did he?

A. William Wiener claimed exemption.

Q. On what ground?

Mr. Fowler: That is objected to as incompetent, irrelevant and immaterial, certainly in view of my statement that I concede that William Wiener signed these.

The Court: I think he may show what he did.

Mr. Werner: This is Exhibit 21.

(Reads Exhibit 21 to the jury.)

Q. The date of this card appears as June 5. What year is that; can you tell?

A. 1917.

Q. What is the date of the questionnaire?

A. The date of the questionnaire is December the—
[fol. 108] Q. (Handing card.)

A. December 31st; that is when it was returned.

Q. What year?

A. 1917.

Mr. Werner: The concession includes that all the answers to the questions I have just read were written by the defendant Welwel Warszower?

Mr. Fowler: I would like to help you out on that, but I do not think it is the fact. I concede that he executed it after the answers were in.

Mr. Werner: And did he sign it?

Mr. Fowler: Surely.

Mr. Werner: And you also further concede he signed the registration card which is part of Exhibit 21?

Mr. Fowler: Oh, yes.

Mr. Werner: And any other place where the signature of the applicant is called for you will concede it was signed by the defendant?

Mr. Fowler: Yes, at the date of the document.

(No cross-examination.)

Mr. Werner: I offer Government's Exhibit 22 for identification in evidence.

(Government's Exhibit 22 for identification received and marked in evidence.)

CHARLES A. APPEL, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination.

By Mr. Werner:

Q. Mr. Appel, what is your occupation?

A. I am a special agent of the Federal Bureau of Investigation.

[fol. 109] Q. How long have you been such?

A. 15 years.

Q. What is your work with the Federal Bureau of Investigation?

A. I work in the laboratory of the Bureau in Washington, in the examination of papers and questioned documents with reference to the identification of handwriting, typewriting and other problems of that kind.

Q. What schooling have you had, Mr. Appel?

A. I am a graduate of Georgetown University Law School.

Q. Have you had any specific training to fit you for your present work?

A. Yes, sir; I have taken lectures under J. Shore Ashwood of Chicago, and Professor Osborn of New York City, and Dr. William Sowder of the National Bureau of Standards of the United States.

Q. And you have also taken a course in law?

A. Yes, I have.

Q. Have you examined, Mr. Appel, a passport application in the name of Robert William Wiener, Government's

Exhibit 1 in evidence, in the laboratory of the Federal Bureau of Investigation?

A. Yes, I have.

Q. Have you also examined Government's Exhibit 13 in evidence, an application for a re-entry permit?

A. Yes, I have.

Q. And Government's Exhibit 12 in evidence, a re-entry permit?

A. Yes, I have.

Q. Government's Exhibit 18, a baggage declaration of one Welwel Warszower on the steamship Bremen?

A. Yes, sir.

Q. And Government's Exhibit 15, a receipt for a re-entry permit signed "Welwel Warszower"?

A. Yes.

Q. And Government's Exhibit 3 in evidence, a note addressed to the Bureau, "Dear Sir: Please give bearer my passport; am too busy to call personally. Respectfully, Robert William Weiner"?

A. Yes.

[fol. 110] Q. And Government's Exhibit 8 in evidence, a baggage declaration of Robert William Wiener on the S. S. Normandie?

A. Yes, I have.

Q. Have you compared the handwriting on the last named exhibit with handwriting on Government's Exhibit 1 in evidence?

A. Yes, I have.

Q. In an effort to ascertain whether or not in your opinion they were both—they were all written by the same individual?

A. Yes, sir.

Q. And have you prepared photographic enlargements of the exhibits referred to?

A. Yes, sir.

Q. Have you them here?

A. Yes, sir.

Mr. Fowler: If the point of this is to identify the signatures in addition to Government's Exhibit 1, in the interests of shortening the trial the defense concedes that every signature that purports to be the signature of this defendant on any of these exhibits is the signature of this defendant.

Mr. Werner: I cannot accept Mr. Fowler's stipulation in those words, because there are other things concerned. We are prepared to prove that he wrote much of the data in his own handwriting. If Mr. Fowler will concede what we have to prove as to data we will take his stipulation and save time, but I should like to hang up the chart so that I may be sure the concession applies to the words we have in mind, and the jury can see what words we have in mind.

Mr. Fowler: If we are going to hang up the exhibits we might as well go through with it.

The Court: All right, proceed.

Mr. Fowler: Possibly we can save all this if I concede that this data was signed by the man who signed as Wiener. If I can save us all from this entertainment I would like to do it.

[fol. 111] Mr. Werner: I move to strike out the remark about entertainment. And, second, we are not satisfied with Mr. Fowler's concession. We want the jury to see how he arrived at this conclusion and why he arrived at it.

The Court: All right.

Mr. Fowler: I guess we have to go through with it.

Mr. Werner: I move to strike out that remark.

(Photographic enlargements marked Government's Exhibits 23 to 29, inclusive, for identification.)

Q. Are Government's Exhibit 28 for identification and Exhibit 29 for identification photographic enlargements of Government's Exhibit 1 in evidence?

A. Yes, sir; certain portions of that document.

Q. And is Government's Exhibit 23 for identification a photographic enlargement of a portion of Government's Exhibit 13 in evidence?

A. Yes, it is.

Q. And is Government's Exhibit 24 for identification a photographic enlargement—

A. Of the bottom portion of Exhibit 13.

Q. And is Government's Exhibit 25 for identification a photographic enlargement of a portion of Government's Exhibit 15 in evidence?

A. Yes, it is.

Q. And is Government's Exhibit 26 for identification a photographic enlargement of a portion of the face of Government's Exhibit 18 in evidence?

A. Yes, it is.

Q. And is Government's Exhibit 27 for identification a photographic enlargement of Government's Exhibit 12 in evidence?

A. Yes, it is.

(Government's Exhibits 30 to 34 inclusive marked for identification.)

[fol. 112] Q. Is Government's Exhibit 30 for identification a photographic enlargement of a portion of Government's Exhibit 3 in evidence?

A. Yes, it is.

Q. Is Government's Exhibit 31 for identification a portion of the photographic enlargement of Government's Exhibit 8 in evidence?

A. Yes, it is.

Q. Is Government's Exhibit 32 for identification a photographic enlargement of another portion of Government's Exhibit 8 in evidence?

A. Yes sir.

Q. Is Government's Exhibit 33 for identification a photographic enlargement of a portion of Government's Exhibit 1 in evidence?

A. Yes.

Q. Is Government's Exhibit 34 for identification a photographic enlargement of a portion of Government's Exhibit 1 in evidence?

A. Yes, it is.

Mr. Werner: I offer Government's Exhibits 23 to 34 for identification, inclusive, in evidence.

Mr. Fowler: I object to their materiality, in view of the statements I have made.

The Court: The objection is overruled.

Mr. Fowler: Exception.

Q. Now, Mr. Appel, will you resume the stand for a moment.

Mr. Werner: At this point, your Honor, may I read Government's Exhibit 22 in evidence to the jury, which is a stipulation?

The Court: Yes.

(Mr. Werner reads Government's Exhibit 22 to the jury.)

Mr. Werner: May I suggest a recess at this point, inasmuch as it is quarter to 1 and the witness will be lengthy.

(Recess to 2.10 p. m.)

[fol. 113] Afternoon Session, 2.10 P. M.

CHARLES A. APPEL, resumed the stand.

Mr. Werner: If your Honor please, Mr. Fowler has consented that we may withdraw this witness for a period of a few moments and put on another witness.

The Court: Very well.

(Witness temporarily withdrawn.)

LENA B. SCHENCK, called as a witness on behalf of the government, being duly sworn, testified as follows:

Direct examination.

By Mr. Werner:

Q. What is your occupation?

A. I am a special deputy and assistant chief clerk in the Atlantic County Court House at Mays Landing, New Jersey.

Q. And William A. Blair; he is the clerk of that office?

A. He is.

Q. Now I show you Defendant's Exhibit C in evidence and call your attention to the certification on the second page and ask you if that was prepared by you?

A. Yes, sir.

Q. Do you say yes?

A. Yes, sir.

Q. And I further call your attention to the fact that the certification reads:

"I, William A. Blair, Clerk County of Atlantic and also clerk of the Common Pleas, the Courts of Oyer and Terminer, the Court of Quarter Sessions, and Juvenile Court, the same being Courts of Record *due* hereby certify that [fol. 114] the foregoing birth certificate, is properly attested by the Keeper of said records of births and that the seal of the Keeper of said office is annexed to said certificate and that the attestation of said record is in due form and signed by the proper officers.

In testimony whereof I have hereunto set my hand and affixed the seal of said Courts and County, at Mays Landing, N. J., this 8th day of February, 1940.

William A. Blair."

Q. Are you familiar with Mr. Blair's signature?

A. Yes, sir.

Q. Is that his signature appearing on Defendant's Exhibit C?

A. Yes, sir, it is.

Q. You say you prepared this certification?

A. I dictated it. I didn't type it.

Q. When you dictated it did you inspect the article which is certified to, to see whether it was a birth certificate.—

Mr. Fowler: Pardon me—

Mr. Werner: I have not finished my question, sir.

Q. (Continued) When you prepared the certificate did you inspect the first sheet of Defendant's Exhibit C to ascertain whether or not it was in reality a birth certificate or whether it was merely a transcript from the records of birth of the City of Atlantic City?

Mr. Fowler: I object to that on the ground that it calls for this witness's interpretation of the document, which speaks for itself.

The Court: She can tell what she did.

A. I glanced at it. I had been told by our Assistant County Solicitor—

[fol. 115] Q. You can not tell us what he told you.

Mr. Fowler: Hearsay.

Q. Just tell us whether you examined it carefully.

A. I didn't examine it carefully.

Q. Do you know where the birth certificates are kept?

A. In the Bureau of Vital Statistics, Trenton, New Jersey.

Q. Are they kept in your county or in Trenton, New Jersey?

A. Trenton, New Jersey.

Q. And I call your attention to Defendant's Exhibit C, which was certified to be a copy of a birth certificate, and ask you if after looking at it you can state now whether it is a birth certificate or merely an extract of a record of birth in Atlantic City?

Mr. Fowler: I object to that.

The Court: Objection sustained.

By the Court:

Q. There are no birth certificates I understand in your office,—you just have a transcript?

A. We never had birth certificates.

Q. When you prepared this you looked at the transcript in your office?

A. I only prepared the exemplification of the certificate.

By Mr. Werner:

Q. You have never seen such a birth certificate?

A. No.

Q. All you have seen is the first page of Defendant's Exhibit C?

A. That is it.

Cross-examination.

By Mr. Fowler:

Q. The matter of authenticating a document is a serious proposition in your office, is it, Madam? I mean you go about it with some care, don't you?

A. I do.

[fol. 116] Q. You prepared this statement under oath for Mr. Blair, the clerk of the court?

A. Yes, sir.

Q. And after you prepared it you submitted it to him?

A. Mr. Blair was not there.

Q. How long has Mr. Blair been clerk of all of those courts recited here?

A. For fifteen years.

Q. And you know his signature?

A. Yes, sir.

Q. Mr. Blair is a careful man, isn't he?

A. Yes, sir.

Q. And he signed that statement you prepared?

A. Yes, sir.

Redirect examination.

By Mr. Werner:

Q. Did he sign an exemplification of Defendant's Exhibit C before you filled in the upper part?

A. We have the exemplifications signed in case he is not there, signed by Mr. Blair and the judge.

Q. Was Mr. Blair there when you filled in the exemplification?

A. No.

Q. And you delivered it out without Mr. Blair ever having seen the first page?

A. Yes, sir.

Recross-examination.

By Mr. Fowler:

Q. Do I understand you correctly, Madam, you signed this Defendant's Exhibit C with Mr. Blair's signature being affixed on that line before anything was written in before it on the typewriter?

A. Yes, sir.

Q. Is that your habit?

A. That is our habit at time when he is not available.

The Court: In other words, he signed these exemplifications in blank and you filled them in?

The Witness: If it is necessary, if he is not present.

Q. Who is Mr. Palmer M. Way?

A. Judge of the Common Pleas Court.

[fol. 117] Q. And you certified to the fact Mr. Blair in his own handwriting has hereunto subscribed his name and affixed his official seal to the foregoing; your judge subscribed to that, too, and you still say Mr. Blair hadn't seen it?

A. Mr. Blair hadn't seen it.

Q. Now, when did Mr. Blair sign at the foot?

A. At the same time he signed the other—

Mr. Werner: Keep your voice up, please.

A. (continuing) At the same time he signed the first. The whole thing was signed at the same time.

Q. Then Mr. Blair signed before your judge signed?

A. He certifies to the judge; the judge certifies to him.

Q. And Mr. Blair had certified to this before the judge had signed it, is that right?

A. Mr. Blair—

Q. Just yes or no.

Mr. Werner: If you can, just answer that question yes or no.

Q. Mr. Blair certified that Judge Way signed it before he signed it, didn't he?

A. The judge signed—

Q. Didn't the judge sign in blank too?

Mr. Werner: Let the witness finish her answer, please.

Mr. Fowler: I thought she had finished her answer.

Q. Did the judge sign in blank too?

Mr. Werner: Had you finished your preceding answer?

The Witness: Your question was what, please?

Mr. Fowler: Don't let us get confused here. Mr. Stenographer, will you please read the last question?

(Record read.)

[fol. 118] The Witness: They were all signed at the same time as far as I know.

Q. Then your testimony is, I take it, that Judge Way signed this certification before you had filled it in in type-writing, is that so?

A. Yes, sir.

Q. Signed something that he didn't know what he was signing?

Mr. Werner: I object to that.

The Court: Sustained.

Q. Did you show it to Mr. Blair?

A. Mr. Blair was not there that afternoon.

Q. Did you show it to Mr. Blair before you sent it out of your office?

A. Mr. Blair was not there.

Q. Did you show it to Judge Way before you sent it out of your office?

A. He was not there.

Q. How many documents had you prepared for certification before you prepared this?

A. I couldn't tell you that.

Q. A great many?

A. Yes, sir.

Q. How long have you been in that office?

A. Thirty years.

Q. Now, you talked to the district attorney here about what you had done when you came here as a witness, in answer to his subpoena, didn't you? Not only talked to

Mr. Werner but maybe some other man in the district attorney's office, did you?

A. Well, I don't know whether I was in the district attorney's office or not.

Q. I don't care where you were, Madam. It is to whom you talked I am interested in.

A. I don't know; somebody brought me a subpoena.

Q. Did you talk to Mr. Werner before you took the stand?

A. When I came in I had to see him.

Q. Did you talk to Mr. Dunigan?

A. I don't know whether Mr. Dunigan is.

[fol. 119] Mr. Dunigan: I am Mr. Dunigan.

The Witness: I just passed the time of day.

Q. Now, until you talked to them you thought that this was all right, what you had written in?

Mr. Werner: I object to that. There is an innuendo in it.

The Court: Sustained.

Mr. Fowler: Exception.

The Court: You meant to make an honest certificate?

The Witness: I did, your Honor.

Q. And to the best of your ability you did make an honest certificate?

A. I did it in all good faith.

Q. After you talked to Mr. Werner you made up your mind it might not have been a birth certificate, is that it?

Mr. Werner: I object to that.

The Court: Sustained.

Mr. Fowler: Exception.

By Mr. Werner:

Q. Did I tell you the only thing we are interested in is the truth?

A. You did.

The Court: I have not the slightest doubt but this woman is telling the truth.

Mr. Fowler: There is no question but she is telling the truth, your Honor.

Mr. Werner: Thank you.

(Witness excused.)

[fol. 120] CHARLES A. APPEL, resumed the stand and further testified as follows:

Direct examination continued.

By Mr. Werner:

Q. Mr. Appel, have you compared the conceded standard in the handwriting of the defendant, Government's Exhibit 1, the passport application, with the writing and the signature in Government's Exhibit 13, the application for re-entry permit, the writing of Government's Exhibit 18 in evidence, the baggage declaration with the name Welwel Warszower, Government's Exhibit 15, the receipt for re-entry permit, Government's Exhibit 12, the re-entry permit in the name of Welwel Warszower, Government's Exhibit 8 in evidence, baggage declaration, Robert William Wiener, and Government's Exhibit 3 in evidence, a note signed Robert William Wiener, with a view to ascertaining whether or not they were all written in part by the same individual?

A. Yes, I have.

Q. Have you reached an opinion?

A. Yes.

Q. What is your opinion?

A. I came to the conclusion that they were all written by the same person.

Q. Will you state to his Honor and the jury, and illustrate your reasons for that opinion?

Mr. Fowler: This has all been conceded and I object to it as unnecessary repetition.

The Court: Overruled.

Mr. Fowler: An exception.

A. The charts in the center are photographic enlargements of the conceded handwriting of the defendant. The writing on the right is the note and other questioned writing in the name of Robert William Wiener, and that on the left in the name of Welwel Warszower.

You see the name Robert William Wiener on the known writing, and I have marked on these charts certain numbers [fol. 121] to represent the same letters, and to call your attention to characteristics of the writing which I found in the known writing and in the questioned writing on which I base my opinion.

Mr. Fowler: There is no question about the writing before this jury. We concede that every word of that writing is in the handwriting of the defendant.

Mr. Werner: Mr. Fowler only concedes signatures, and there was in-^uendo as to the words "birth" and "date" on the baggage declaration which Mr. Fowler cross examined on. We want to show it is all in the same handwriting.

Mr. Fowler: Every word that this witness is now calling "in the questioned handwriting" is highly prejudicial in this case. It is not questioned. It is conceded and admitted.

The Court: The objection is overruled.

Mr. Fowler: Exception.

A. (Continuing:) No. 1 refers to the capital letter "W" in the conceded handwriting which begins with a large loop, and the two legs are of different heights, the second being higher than the first. This is an additional way in which this person makes this letter. The center portion which does not go up as high is two different ways of making this portion of the letter. Sometimes the junction at the top is more pointed than it is at other time-. In the note you see the same characteristics of the "W", the second leg is higher than the first. The inside portion in this one is pointed, and there is variation in that regard in the two different writings.

The whole name "Robert William Wiener" is very similar in slant and in the pressure of the hand and in other characteristics in the conceded writing and in the writing of this note.

[fol. 122] No. 2 refers to the letter "e" which is peculiar in that it is a form of a capital letter rather than a simple loop, and the writer uses the same loop in the words "respectively" and "respectfully". In the word "Wiener" he uses the loop again. He has two forms. The capital form slants down to the right because of the way it is made; and that peculiarity we see in the known conceded writing in which the word "Wiener" the last "e" slants so far it appears to lay down; in the beginning of the word it slants not quite so much. We have the same form of "e" in other words. We have the two different form- of "e".

No. 3 refers to the "r" which also appears in more than one form in all these writings. The final letter of the word "Wiener", it appears with a curve, with a sharp line up to the right entirely different from that in "Crotona" in

which there is a bend at the left, and in the word "Bronx" and in the word "Robert", where it appears more like an "i". In the word "Robert" we have this same form in this note, in which it appears more like an "i". It has no horizontal line at the top at all. In the word "Wiener" the final letter of the word, it starts sharply off to the right. There are different ways of making the same letter, which we find to be similar in the conceded writing and in this note.

No. 4 refers to the letter "a". This letter is peculiar in that it follows the European form of letters, in which there is an upstroke and then the line is drawn over to the left, the pen is lifted and begins the stroke again at the root of the "a"; that is not an American handwriting habit, but a European one. That is not always followed in this writing. Sometimes the hand starts at the right as we normally do; but in the word "personal" there is an upstroke and the hand is thrown to the right. We see the same characteristic in the word "William". In the word "Crotona" it is very clear, there is an upstroke and the line is drawn to the left, the pen is lifted and starts again and the pen [fol. 123] comes up. That is different from the style in this country. In the word "park" we see the hand begins at the right and comes around as we normally do.

5 refers to the letter "n". There are clockwise loops at the top of the letter. In the conceded writing it is more like a letter "u" rounded at the bottom. That rounding is sharper in the word "Wiener", the "n" that appears there. It occurs in different ways in the different documents, but there is the tendency to round it at the bottom more than other people do. You see the same characteristics in the "n" in the word "Wiener." In the word "personal" where it is sharp because of the way it is made in that particular letter.

Q. Will you refer to the exhibits by exhibit numbers, please?

A. That refers to Exhibit 3, the note.

This is an enlargement, of Exhibit 31, of the baggage declaration entry in which we see the name "Robert William Wiener" at the top of the page. It has the same numbers, referring 1 to the "W" in which the second leg is up to the right and not on the same line of writing. The inner portion is rounded or sharp depending on the way in which

it is made in that particular word. In the word "William" it is rounded and in the word "Wiener" it is sharp.

In the conceded writing it is rounded in "William" and in "Wiener" it is sharp.

2 refers to the capital "E" which sometimes seems to lay down.

Here again we see in the word "Normandie" the loop form of "e" and in the word "Robert" the same loop form, just as we see in the word "Wiener" the laying down capital "e".

No. 4 refers to the letter "r" again. In the word "Robert" it looks like an "i". In the end of the word "Wiener" there is a tendency to make a sharp slope to the right. In the word "Normandie" it is more like an "i".

[fol. 124] Q. Will you discuss the words "birth" and "date" in the baggage declaration and state if in your opinion it is in the same handwriting as that on Exhibit 1.

A. The handwriting on Exhibit 31, the word "date" occurring on the third line here is in the handwriting of the defendant, the person who wrote the conceded writing just as are the other entries on this baggage declaration. My reason for that are the characteristics. We have the letter "r" rounded, and in this particular letter there is a sharp angle at the beginning of the letter. We saw in the conceded writing in the word "Bronx" that sharp angle at the left and the rounding on the other portion of the letter. We see the letter "B" below this entry on the same page in the baggage declaration which is Exhibit 31, we have the word "bottle". The "b" in this is different from those made by some other people in that at the end of the letter there is a loop. It is the same in the word "bottle" as in the word "birth." The "t" is peculiar in that instead of a horizontal stroke at the top to complete the letter, at the end of the downstroke there is a loop made at the bottom of the "t" proceeding to the "h". This peculiarity of this writer probably proceeds from a European style of writing, because that is what is taught in some European styles of writing. We have it here in the "th" in the conceded writing, Exhibit 29, in which the crossing of the "t" is at the bottom and the cross-mark of the "t" proceeds directly to the next letter, just as it does in the word "birth" in that baggage declaration, Exhibit 31. At the same time we see that the person who wrote the word "birth" and the word "date", in the word "date" crosses the "t" at the top.

That is also the habit in the conceded writing in which there are other "ts" crossed at the top. This tendency is shown in the word "date" in which the cross-mark appears at the bottom to act as a connecting stroke to the next letter. That is a peculiar characteristic and proceeds from the fact that the person was probably taught to write in Europe. [fol. 125] In the word "date" we see the letter "a" in which there is an upstroke and the line is thrown over to the left and the pencil is lifted and the hand begins again to proceed from the "a" to the "t" with a connecting stroke. That is the European way of making an "a". That is the same characteristic we see in the conceded writing in the word "Atlantic" in which the hand goes up and the line is thrown over, the pen lifted to make connection to the next letter.

Those are my reasons for believing the words "birth" and "date" and the other writing on Exhibit 31 was written by the defendant. That is the baggage declaration.

There are additional numbers which refer to the "a" and the other letters.

The 5 refers to the "n". The "n" in the word "Bronx" in the baggage declaration is in the form of a "u" more than it is like an "n" as taught in the copybooks. That also occurs in the word "Bronx" and other words in the conceded writing.

No. 6 refers to the "x" in the baggage declaration, the final "x" in the word "Bronx", the hand goes up and makes an angle off to the right and is lifted to make the cross-stroke. The way that letter is taught in this country is to make a curve over at the top and then draw a line through it. In the word "Bronx" there is an upstroke and a curve to the right.

No. 7 refers to the capital letter "B" in Exhibit 31, in which the curves and formation of the letter at all points is strikingly similar to the way it appears in the conceded writing, Exhibit 29.

The whole word "Bronx" is very similar in appearance. We do not expect it to be exactly similar. In the "r" in "Bronx" the "r" is more rounded; that is one of the variations. At this time in the known writing, the conceded writing, the word "Bronx" there is this little angle at the left at the beginning of the "r", and that is a variation which is [fol. 126] normally to be expected of persons who make different types of letters at different times.

The 8 in Exhibit 31 refers to the capital letter "Y". Here again the writing stems touch an oval at the beginning of the letter before making the curve at this point. In this writing there is a short upstroke and then the "u"-portion of the "Y" is made and then the loop at the bottom. You see the same formation in the conceded writing in the word "York", which is an upstroke and the U-portion curved and then the crossing of the bottom loop is just below the U-portion of the "Y". That is as it is in the baggage declaration entry, Exhibit 31.

Another characteristic of the word "York" is the final "k" which is a capital form of "k" and yet appears at the end of the word. That makes the whole word "York" in the conceded writing Exhibit 29 look just exactly as the word "York" does in Exhibit 31, the baggage declaration entry. The lower portion of this baggage declaration Exhibit 32, we have the signature Robert William Wiener. In this word "Robert" we see the capital form of the letter is used, and just above it in the other spaces the loop form. In other places we see the capital form again and the loop form; two different ways of making the same letter. This seems to be haphazard in the way they are placed in the name.

In the word "Wiener" we see the hand turns over and carries off at an angle. It is a peculiar formation of a final letter which this individual does, whereas at the same time at other places where the "r" is the second letter, in the word "bracelet", the upper portion is rounded, and in the word "rings" there is a sharp angle at the upper left. Different ways of making the same letter.

In the conceded writings, Exhibits 29 and 34, in the word "reason" there is a sharp angle at the upper left and a horizontal line, and in the word "York" the letter is entirely rounded. There are different ways of making the same letter.

[fol. 127] In Exhibit 23, the signature "Welwel Warszower" we see similar characteristics. The letter "W" at the beginning of the word "Warszower" with two legs which are not of the same length so far as the line of writing is concerned. At the same time the middle portion is rounded in this particular letter. The beginning of the word "Welwel", the two legs do not come down to the line of writing at the same length. It is a different shape of a letter from the "W" in "Warszower." This individual

makes the "W" two ways. You see in the conceded writing the lower portion of the "W" in the "Wiener", the two legs do not come down to the line of writing at the same distance, so that the second line is higher than the first. There are different ways of making the "W".

No. 2 again refers to the letter "e", which is a capital form of "e" and slants rather than being entirely vertical.

No. 3 refers to the final "r" in which the hand is carried to a sharp angle and then off to the right. The final "r", which is peculiar to this writer. And yet in the second letter the "r" is simply in the shape of an "i".

No. 4 refers to the "a" in "Warszower", and this is the form of an "a" in which the hand begins at the right and then comes all the way around, and instead of coming back to the line of writing it comes to form the next letter at a height higher than the line of writing. That is a habit we see in the conceded writing in some of the "a's" where the letter is made in two different ways. Sometimes it is made as in the word "manager" with an upstroke and a throw-over, the pen is lifted and taken over to the right to connect the line with the next letter. In other places the hand begins at the right and comes down and makes the whole leg with it; but there is a tendency not to come down to the line of writing. Sometimes it does come down, but not always. There are two different ways of making of the letter.

[fol. 128] In Exhibit 24 we have two signatures, "Welwel Warszower", in which we observe the same characteristics. The "W" in No. 1, the legs are more or less angular, that is sharp-pointed, and the center curves more or less depending upon accident or the stroke at which it is made. The fact that it varies in both Exhibit 24 and in the conceded writing we have already referred to. The second leg, it doesn't come down to the line of writing so far as the first one does. The "W" is lower than the remainder of the word in most instances.

2 refers to the capital form of "e" which lies down and slants. People sometimes makes a capital form in the middle of the word like this, but the exact way in which this is made compares with the conceded writing.

We have again No. 3, this final "r" which is peculiar in that the hand is carried to the line of writing and sharply off to the right. In the word "Warszower" the "r" is simply rounded and more like an "i". Here we have the "a" in which the hand does not come to the line of writing.

Another characteristic is to write all the writing slightly above the line provided for the purpose, just as is shown in the conceded writing. The whole word is up off the line of writing; not always, but there is a tendency to do that.

In Exhibit 25 we have the signature "Welwel Warszower" again. We see that the whole word, both words, are up off the line of writing. You see there are more than one shape for the "W" in which the legs are more or less angular at the bottom. In the word "Warszower" the first leg comes to an angle and the second leg is curved.

No. 2 refers to the letter "e", a capital form of "e", and yet it appears to lay down and slant just as it does in the word "Wiener" in the conceded writing.

The second letter "r" in "Warszower" in Exhibit 25 is curved at the top. The "a", again there is this tendency [fol. 129] not to bring the hand to the line of writing in going to the next letter.

In Exhibit 26 we have the signature "Welwel Warszower" at the top and other entries on the page. We have again these "W's" which are different from each other and similar to the conceded writing of Wiener. We have too the capital form of "e" which appears to be falling down in a slant, and yet the word "Wellwel" we have a loop form of "e", a combination of these two made in a way similar to the conceded writing. We have a final "r" here which is unusual, and in the word "Bronx" we have the same thing.

In the second line, "745 East 175th Street" we have this formation of the "t" in which the horizontal cross-line is used as a connecting stroke to the next letter just as we have it in "th", "September 5th" in the conceded writing. That is unusual due to a tendency to cross the "t" at the bottom, as is done in Europe. That is characteristic No. 10.

In the word "Bronx" we see the word "B", the "n" and the final "x" as it appears in the conceded writing.

Here we have also in Exhibit 26 the word "gift" in which there is a capital "G" and also a small "f". This capital "G" is like the capital "G" in the conceded writing, the word "gray".

Q. Also look at the capital "G" in the word "Gray" in Exhibit 34. There is a loop at the upper left of the letter and none at the right.

A. That is the habit of this individual.

In Exhibit 27 we have the signature Welwel Warszower in which we find the two different forms of "W". Again the second leg being higher than the right, the "W" comes down lower on both words than the line of writing of the other letters.

The "e" is a capital form of "e" and slants.

The final "r" in Warszower is a form in which the "n" comes to the bottom and then off to the right.

[fol. 130] The second letter "r" in the word "Warszower" across, over the top. We have this "a" form made in the American way, in which the hand went all the way over to the right and then back, but does not tend to return to the line of writing.

It is not the way the "e" or "r", or any of these single characteristics, but the combination of them altogether which leads me to the conclusion that these were all written by the same person who wrote the conceded writing.

(Witness returns to the stand.)

Q. Mr. Appel, have you also examined in the laboratory of the Federal Bureau of Investigation the so-called Atlantic City Birth Register, Government's Exhibit 9?

Mr. Fowler: I object to the form of that question, the so-called birth certificate.

The Court: Did you examine the contents of Exhibit No. 9?

Q. (Continuing:) And Government's Exhibits 10 and 11, two pages from Government's Exhibit 9?

A. Yes, sir, I did.

Q. Now did you examine the writing on the last lines of page 164?

A. Yes, sir.

Q. And entry with respect to the name Wiener with a view of forming an opinion whether or not that was written in the same handwriting as on the other entries on that page preceding it and entries succeeding it?

A. Yes, sir, I did.

Q. Have you reached an opinion?

A. I came to the conclusion it is not in the same handwriting.

Q. Have you prepared photographic enlargements of Government's Exhibits 10 and 11?

A. Yes, sir.

The Court: Let me see them, Mr. Appel.

(Enlargements handed to the Court.)

[fol. 131] (Marked Government's Exhibits 35, 36 and 37, for identification.)

Q. Mr. Appel, is Government's Exhibit 35 for identification a photographic enlargement of a portion of Government's Exhibit 11 in evidence?

A. A photographic enlargement of a portion of Government's Exhibit 10 in evidence.

Q. And is Government's Exhibits 36 for identification a photographic enlargement of a portion of Government's Exhibit 11 in evidence?

A. Yes, sir, it is.

Q. And of what is Government's Exhibit 37 for identification an enlargement of?

A. That is a portion of Government's Exhibit 10.

Q. What portion of that, is that the preceding page?

A. That is the portion of the page above the entry Robert William Wiener, on page 164.

Q. Now will you give his Honor and the jury the reasons for your opinion that the entry on the last line is not written in the same handwriting as the other entry.

A. In the first place it is not at all in the same style of writing; in writing above, the bottom entry is a style of writing which was taught before 1900. You see this type of "c" and the other letters are a style of writing which is not taught today. This capital "L" (indicating).

The "W" is rounded at the bottom with a loop in the center, which is a variation of the style taught there and is entirely different from the "W" in the word Robert. William Wiener. In fact, the man who wrote Robert William Wiener is a much poorer writer than whoever wrote the entries just above that. Not only taught a different style of writing but he does not write as well, does not shape the letters. The "W" he had particular difficulty with.

In the word "Wiener" this "W" is written over the "ie."

In the word "Robert" the final "t" is a different style and shape from the final "ts" in the other writing.

[fol. 132] In the word "Merchant" the hand is simply carried down to the bottom of the letter and then off to the right in this style of writing, whereas in the word "Merchant," in the entry, for Robert William entry at the bottom of the page, there is a cross stroke, and in the word "Robert" there is a cross stroke to finish the "t" which is not the style used in the writing above that.

The dot is a different type of dot made in a different way from the letters above.

The "R" is particularly different. In the writing above there is a sharp, clear horizontal line at the top of the "R," whereas we see in the word "Robert" that the letter consists of carrying the line up to the top and then down without any horizontal line, and that is true of all the entries across the whole page.

The letter "S" is the word, on the 16th, the word "Shink", or whatever it is, opposite the 16th, the capital "S" is a different shape from the "S" in the word "Solomon" in the questioned entry, because of a different style and a different way of executing the letter by the writer on the bottom of the questioned entry. All of the letters are executed in a different way. The pen is held differently. The slant is not the same and the writer of the bottom entry is not able to write in as clear, well rounded, well formed letters as appear above.

It is not one feature but a combination of several which caused me to believe that that entry was made by a different person.

(Mr. Appel returns to the stand.)

Q. Now have you examined the last entry on the pages of Government's Exhibits 10 and 11 with a view towards ascertaining the relative age of the ink with the other entries on that page?

A. Yes, sir, I did.

Q. And have you reached any opinion?

A. Yes, sir.

[fol. 133] Q. What is that opinion?

A. The other entries on the page of Government's Exhibits 10 and 11 and, in fact, the other entries in the book, the ink is faded. It is brown, it is not black, whereas the entry "Robert William Wiener" across the bottom of the page is blue and black. Unless the page was subjected to two different conditions so that the bottom line was kept

from conditions which would age it, it should be the appearance, the same faded brown appearance as other entries on the page, whereas it is not. It has the appearance of an ink which has not aged as the other entries have aged.

Q. You say it was kept from some condition that would age it. Just what do you mean by that?

A. The reason that the ink fades is because of exposure to light, heat and air, although a book like this may be kept closed over a long period of time, such as 30 or 40 years, it will, nevertheless, age and become brown. The brown is caused by the iron in the ink oxidizing just as rust does and assuming a brown color. There is no such brown ink in the bottom line.

Q. Have you examined the paper along the bottom to see if that was differently exposed to the paper along the top of the page?

A. Yes, sir.

Q. Does it show any signs of a different exposure?

A. Slightly.

Q. Under-exposure or over-exposure?

A. Over; it appears to be exposed more than the remainder of the paper.

Q. In other words, if the entry on the last line were made at the same time as the entries on the other lines that, in your opinion, should be more faded and not less faded?

A. Yes, sir.

Q. Now, have you compared the entry on the last line, the ink in the entry of the last line, with other inks throughout the book?

A. Yes, sir, I have.

Q. Have you found some entries which are comparable in degree of exposure?

A. Yes, sir.

[fol. 134] Q. And will you look through the book, Government's Exhibit 9, and tell us which entries you refer to. Before you answer that question I would like to put you one more, and that is, is there any method known to science, of your knowledge, from which it is possible to tell the exact date when certain ink was used?

A. No, sir, there is not.

Q. What is a method of gauging dates?

A. The reason that you can not tell when an entry was made, by comparing the entry with known specimens, known

to have been prepared on a certain date, to see whether the aging that has taken place is similar to the known age, age of the known ink, is because there is no way in which to tell what conditions a questioned entry such as this was subjected to. But here we have numerous entries on the same page, and unless the age conditions are different from those two entries they should present the same appearance, whereas they do not.

All of the other entries are brown and not black, they are faded, changed; whereas the questioned entry is fresh, unchanged, comparatively speaking.

I found entries on other pages, such as the entry on page 149, which is made between the first and the second line.

Q. Will you read us that entry.

A. "When registered? July 28, 1938. Date of birth, September 23, 1895."

Q. And how does the 1938 compare with the questioned entry in the name of Wiener?

A. It shows approximately the same freshness.

Q. When you say "approximately" do you mean within the first days or weeks or years?

A. I cannot tell that. I mean it is not faded brown and it is not appreciably different in appearance or color from the questioned entry on Government's Exhibits 10 and 11.

Q. Have you found any other entries comparable in degree of oxidization?

A. There is one on page 102. "When registered? October 31, 1938. Date of birth? January 29, 1892." The name and other data is given.

[fol. 135] On page 89 there is an entry, "When registered? March 31, 1939. Date of birth? November 28, 1890."

On page 23 there is an entry "When registered? July 12, 1939. Date of birth? November, 1881."

In those entries the ink has not faded appreciably compared to the remaining entries showing "When registered? 1883," and other early dates.

Q. Mr. Appel, you have examined these inks under a microscope here in court and you have examined them in a technical laboratory?

A. Yes, sir.

Mr. Werner: You may examine, Mr. Fowler.

Cross-examination.

By Mr. Fowler:

Q. I wonder, sir, if you will turn back to this enlarged exhibit of Exhibit 13, somewhere in this first batch on the line there (indicating). (Witness leaves the stand.)

Mr. Fowler: Can I have Exhibit 13, please?

(Exhibit 13 handed to Mr. Fowler.)

(Witness returns to the stand.)

Q. I hand you Government's Exhibit here, No. 8 (handing to witness), and this Government's Exhibit 31, is the enlargement, your enlargement of the first half of that paper, is it not?

A. Yes, sir.

Q. On the enlargement all of the writing, the handwriting above the printed line, that I and those accompanying me are residents of some country, and their baggage is enumerated below; all of the writing above that on your enlargement of the exhibit appears in the same color, does it not?

A. It is black and white.

Q. I mean as a photograph it would, whether pencil or ink writing, isn't that so?

A. No, that is not true. The pencil writing in "birth" [fol. 136] and "date" is more black than the ink writing.

Q. You say more black?

A. More gray.

Q. You say the word "date" is not the same color as "N. Y.", New York?

A. About six feet off it might be, but it is not if you get close to it.

Q. On the exhibit itself there is a marked difference?

A. Well, one is pencil, the other is ink. There is that difference, of course.

Q. Well now, Mr. Appel, but the fact that those two words were written in, in those blank spaces, in pencil, when all of the rest of that paper appears to be made and was made in ink, did that create any suspicion in your mind at all when you examined the document?

A. It caused me to examine it carefully.

Q. Well then it did create a suspicion in your mind?

A. No suspicion, a suspicion of what?

Q. There was something in your mind to cause you to examine it a little more closely than if it had all been ink?

A. Naturally.

Mr. Werner: Of course it is interesting, this matter of the psychology of his mind.

The Court: All right, proceed.

Q. Your answer to the last question, this small letter "a", as shown in the word "date", you say the writer traces the stroke up and then makes a loop and then comes back?

A. Yes, sir.

Q. And that is distinctly European?

A. Yes, sir.

Q. The letter "a" in Government's Exhibit 21, in the name "Warszower", doesn't do that, does it? You said it was written more on the American style.

A. That particular one.

Mr. Werner: There are two questions there; one, does it; and two, is it written in the American style? I think [fol. 137] Mr. Appel should be permitted to answer one at a time.

Q. With the help of both of us will you answer that question. The first "a" in "Warszower".

A. Which Warszower?

Q. In the photograph, this was the one you were pointing out to the jury when you told us what you did about this Exhibit 27, you came to this and said "This does not loop back. It is written more in the American style."

A. That is so.

Q. Now he was more of an immigrant when he wrote that Exhibit 27 than when he wrote this baggage declaration.

Mr. Werner: I don't know what "more of an immigrant" means. It is our contention that he is still an immigrant.

Q. He was more of a European, he was fresh out of Europe when he wrote this first one.

Mr. Werner: I object to that question.

The Court: I don't know whether he is more of a European.

Mr. Werner: They are differently dated, if that is what Mr. Fowler has in mind.

The Court: That is a matter to be directed to the attention of the jury, the dates.

Q. I understood you to say that the man who did all this writing had a habit of writing above the line?

A. Yes, sir, I said he has a tendency to write above the line.

Q. Look at the word "date", one of the words written in lead pencil. Is that written on the line or slightly above it?

A. Slightly above it.

Q. Do you see where the letter "D" touches the line?

A. No, it does not.

[fol. 138] Q. How far did he miss that line with "D" and "a", or whoever wrote it, how far did the writer of the word "Date" miss the line with the letter "D"?

The Court: He can give us his estimate of the distance that it is above the line.

The Witness: Slightly above the line.

Q. Would you say the connected line of "t" is above the line in the word "Date"?

A. No.

Q. "Date" is pretty nearly on the line?

A. Part of the word

Q. "Birth" is on the line?

A. No, it is above the line, just as it is in the other writing on the page in the word "Wiener".

Q. In the other word, in the word "Normandie", for instance, it is not ever struck above the line or has missed the line, as in the word "Normandie".

A. That one rests on the line as in the word "Date". Yes, the other letters in that word slightly above the line, as they are in the word "Birth", and as they are in that conceded writing.

Q. You say "Birth" is above the line and "Date" above the line in the pencil writing, and for that reason you conclude Wiener, or the man who wrote the writing on this Exhibit 31, wrote the two pencil words; is that your testimony?

A. No, sir, it was not. I said that was one characteristic.

Q. That is one characteristic that leads you to believe the writer was the same writer who wrote those two words in pencil?

A. That is right.

Q. Look at the word "Robert". Will you say that is on the line or right off the line?

A. Some of the letters touch the line and others do not.

Q. Of the six letters in the word only two miss the line and the other four are on it?

A. Yes, sir, there are four letters that touch the line.

[fol. 139] Q. Out of six. Now let us get to Wiener. Out of six letters there, how many letters touch the line?

A. Several of them touch it but not all of them, any more than in the word "William", just before that, in which the word "W" intersects the line and above the line, show a tendency to write above the line.

Q. Take the word "Normandie". Out of nine letters how many letters hit the line?

A. About four.

Q. Take "735 Walton Street." How many letters and figures missed that line?

A. Oh, several of them intersect.

Q. Any of them miss at all? Aren't they all on the line?

A. The "W" is not.

Q. The first part of it, isn't it?

A. Part of it touches it, yes, sir.

Q. You told us that the crossing of a "t", like in the word "Birth," is the European characteristic, is that right?

A. It shows the style of writing which is taught in Europe.

Q. Now let me call your attention to an enlargement here of the Birth Register of Atlantic City, Exhibit 36, where you were telling us that the bottom entry differs from all of the others because the writer of the others used an old school method taught in this country.

A. That is the only one reason.

Q. Do you see the word "Merchant" there? Would the "t" be crossed in the bottom of that, were the writer of the old school?

A. No, but this is a style taught in this country, and entirely different from the "t" in the words "baggage declaration", and in the word "Birth". That is what is called a speed type of "t". That is the American style. It does not resemble the other.

Q. You say it does not look like the other "t" at all?

A. No, sir.

The Court: I think we will take a recess at this time.

(Short recess)

[fol. 140] Q. Mr. Appel, I understood you to say with ink that is written at the same time on the same document, un-

der the same conditions, permitting oxidation, changes color in unison, that is, the color change is the same.

A. If it is the same ink, yes, sir.

Q. If it is the same ink?

A. Yes, sir.

Q. Is there any known method, and is any method known to you by which you can gauge the age of pencil writing?

A. No, sir.

Q. That is something that cannot be told in expert handwriting, isn't it a fact?

A. That is right.

Q. That is writing with a carbon pencil, once it is on there, you cannot tell the age of it?

A. Cannot tell the age of the writing. Of course, the paper on which it is written might be examined.

Q. But let us get right back to this Exhibit 8, Government's Exhibit 8. Once those words "Birth" and "Date" were written in carbon pencil on that paper, there is no method known to science to tell you how old that writing is?

A. That is right.

Q. But had those two words been written in ink different than the body of this paper, you could have begun then to conclude the relative age of that writing, that is the age of that writing in its relation to the other writing, couldn't you?

A. If it was the same ink.

Q. If it was different ink could you tell anything about it as to the relative age of the rest of the writing?

A. Probably not.

Q. Now look at your Birth Register, page 164, Exhibits 10 and 11. Is the entry on the bottom of those two pages in the same ink as was used in the other entries?

A. The same general class of ink.

Q. What test did you submit it to to find that out?

A. I subjected it to tests with different re-agents.

Q. What re-agents did you use, please?

A. Well, I used a large number of different re-agents. [fol. 141] Q. Would you give us their names?

A. Well, I used sodium hydrate. I used potassium compounds that we use. I used 8 or 10 different re-agents. I used stannous chloride, potassium ferro cyanide, potassium chloride, and other re-agents.

Q. Are you a chemist, sir?

A. No, sir.

Q. Did you ever take a course in chemistry?

A. Yes, sir.

Q. Where?

A. High school.

Q. How long ago is that?

A. That was in 1913. However, the testing was——

Q. That is an answer. That is all I asked you. I asked you how long ago was that and you said 1913.

A. You don't wish me to answer?

Q. You can tell the other attorney if you want to. And you, in testing, with your knowledge of chemicals, in testing the writing on the balance of page 164, Exhibits 10 and 11, you found that that writing was made in the same ink as that last entry?

A. I didn't say that.

Q. What did you say?

A. I said it is the same kind of ink, and I made that test in accordance with the test which I am trained to make as document examiner and not depending on any chemistry which I studied in 1913.

Q. Is there any color present in that Wiener entry, Government's Exhibits 10 and 11?

A. A great deal of color.

Q. Blue color?

A. Blue and black.

Q. Blue and black?

A. Yes, sir.

Q. How long does a blue color persist in an ink?

A. Well, there is actually a blue color in the remaining entries on that page, but in order to find it, it is necessary to examine it carefully with a microscope and to wet it.

Q. In other words, that ink was a blue ink also but it is now brown in general appearance?

A. Because of the aging.

Q. Let us concern ourselves with the ink that was used in all of the other entries. On those two pages, Exhibits 10 and 11, what kind of ink would you say that was?

A. It is an iron ink.

[fol. 142] Q. What is known as an iron gall ink?

A. I don't know about the gall part of it.

Q. Did you ever hear of that ink?

A. Yes.

Q. Could it have been a logwood ink?

A. No, sir.

Q. How long before an iron gall ink begins to oxidize?

A. It depends entirely upon the conditions to which it is subjected.

Q. Written in the month of September at Atlantic City in a book that was then closed, how long would you say it would take an iron ink to oxidize?

A. To change to a brown color.

Q. I said oxidize.

A. Well, it is the oxidation which causes it to change to a brown color, and that brown usually starts to appear in ink on paper which is kept from the sunlight and from heat particularly, in about ten years.

Q. Do you know whether this book was kept from heat or was kept in a heated office?

A. No, I don't.

Q. Do you know whether this book was kept from sunlight or was out open on the top of a safe where anybody could open it up?

A. I don't know about that.

Q. Didn't you inquire about that?

A. No, sir.

Q. Is there any change in color in an iron ink after two years?

A. There is a change in iron ink that occurs within a few months after it is written. It loses some of its blue and some of its black appearance, but it doesn't become brown, real noticeably brown, for a long time.

Q. You say black ink loses its black after a few months?

A. Both its black and its blue appearance.

Q. Is it not a fact it loses its blue appearance because the black in the oxidation of the ink takes control of the ink, the iron takes control of it?

A. The iron begins to oxidize and appears brown instead of black.

Q. How long would you say it would take ink to change to a brown if it was started out a black?

A. If it started out—it depends entirely upon the condition. I have notes that were written ten years ago that are just beginning to show brown; I have notes made in 1896 and they are brown like the entries of this page.

Q. Would you say that every iron ink turns brown?

A. In time it does, yes, sir.

Q. In how much time?

A. It depends upon the amount of light to which it is subjected and the amount of heat.

Q. Let us say it is in a closed book in an office. We will simulate the conditions of that birth record. How long do you think an iron ink takes to turn brown?

Mr. Werner: I don't remember any testimony that the book was kept closed all the time, and therefore I object to the question as assuming a state of facts not in evidence.

The Court: I guess there is no proof as to how much it was opened.

Q. A closed book retards oxidation, doesn't it?

A. Yes, sir.

Q. Therefore, it would take a longer time for an iron ink in a closed book to turn brown?

A. Yes, sir.

Q. Assume then the book is closed in a heated office, how long do you say a time must elapse between the writing with an iron ink and the time it turns brown?

A. The only way in which I can answer that question is to refer to my notes, which as I say were made of iron ink of the same kind as this, and are beginning to show brown after ten years. Now of course a variation in temperature from day to day will make a good deal of difference. The greater or lesser amount of iron in the ink will cause it to change more or less, depending upon conditions.

Q. Do you know whether the ink you performed that test with was the same kind of ink those entries were made with?

A. It is the same kind. I could not determine what the [fol. 144] formula of the ink is, but I can determine it is an iron ink or a dye ink or one of the other inks, and that is what I did here.

Q. How many kinds of iron ink were there on the market in 1896, if you know?

A. I don't know the total number of iron inks on the market, but I do know the general history of inks. I do know—

Mr. Fowler: I object to the answer as not responsive.

The Court: You say you don't know how many types of ink there were at that time, of iron ink?

The Witness: That is right.

Q. Does it matter at all how long an ink has been kept in the bottle before it is used as to how soon it will turn color when it is used or after it is used?

A. It makes some difference.

Q. Do you know how long the ink was kept in the bottle that made those other entries on page 164, before it was used?

A. Of course not.

Q. Do you know it was kept in a bottle or in a metallic container—do you know that?

A. Of course not.

Q. Did you make a note how long the ink you used had been in the bottle before you used it?

A. Oh yes.

Q. You did that?

A. Yes, sir.

Q. It was perfectly fresh when you used it?

A. Yes, sir. We keep standards of all the inks manufactured and we make notes and standards of those from day to day.

Q. Are you making tests with ink in the hope that you can determine the age of ink from the color?

A. As much about it as is possible to determine, yes sir.

Q. So far as you have gone, you agree that after a year or so from the color you can not tell the age of ink?

— I think it is impossible to tell the age of ink because you can not tell the conditions under which the ink is kept. If you could tell those conditions you could prove the date [fol. 145] by the information concerning conditions; but here we have different entries on the same page—

Mr. Fowler: I object. That is not called for by my question.

Mr. Werner: I think an expert ought to be allowed to explain.

The Court: You may inquire into that later, if you want to.

Q. When you qualified as a witness you stated part of your education came from attending lectures by Mr. Albert Osborn?

A. Yes, sir.

Q. Do you agree with what he said concerning the im-

portance of telling the age of ink after the color is set for we will say two years, 24 months?

A. Mr. Osborn made no such statement. He stated you could tell the age of ink.

Q. By its color.

A. Yes, sir.

Q. Doesn't he say you can tell the age by its color if you can get the ink while the color is still changing?

A. No; he says if it has blue dye in it it is fresh and not as old as if it is turned brown. That is what he says in his book.

Q. Are you familiar with his book?

A. Yes, sir.

Mr. Werner: Will you give me the page of the book, if you please.

Q. When is oxidation most rapid, in warm or cold weather?

A. In warm weather.

Q. The date of this entry appears to be September.

A. There are ditto marks under the word "September."

Q. Did you read a report by Mr. R. E. Cornish, John Finn, Jr. and Mr. McLaughlin in your study?

A. I don't know which report you are talking about, but I have read articles by Finn, yes.

Q. What did they say about telling the age of ink?

A. By its color?

[fol. 146] Q. Yes.

A. I don't know what they said about telling it by its color. Finn proposed to determine the age of ink by a test of the migration of the salts—the amount of change of the chemical in the line so the salt creeps out into the fibres of the paper away from the line, which is determined by silver nitrate test. That test we performed as a research experiment and found it was not reliable because there is still no way to tell the conditions under which the ink is kept, so you cannot relate the amount of migration of the salt away from the line to any known standard.

Q. You mentioned Mr. Souder of the Bureau of Standards.

A. Yes, sir.

Q. Does he say you can tell the age of ink by its color?

A. A chemist by the name of Mitchell used the method of telling the age of ink by the existence of blue dyes, and that

method has been followed for some time until Dr. Watters of the Bureau of Standards proved that blue dye is present in old inks and that method is followed by Dr. Souder. That is, you cannot determine the age of ink by the presence of blue dye. They all say if ink is fresh so you can see a change in the color from the time you first receive it, for a week we will say, it changes very rapidly when real fresh, then that change proves it is fresh. We have no such problem here.

Q. Do you subscribe to this from Mr. Osborne, at page 475: With the means at hand to make these delicate and accurate color tests it may appear that it ought to be possible to tell by the color alone after one examination how old the ink is. This could be done if inks were all made alike in the first place and then were all kept under the same conditions and used only when they had reached a certain age, and finally if the writings with them were put on the same kind and color of paper." Is that right?

A. Yes, that is right.

Q. You don't go so far as to say that the entry here is in the same kind of ink as the entries above?

A. Yes, the same general kind of ink.

[fol. 147] Q. What do you mean by that?

A. They are both iron ink.

Q. Wouldn't they both have to have the same chemical construction to change color the same with age?

A. No, sir, they would both get brown.

Q. If one had more iron than the other would that make the change of color different in time?

A. One would be a little browner faster than the other.

Q. If one did not have so much iron as coloring matter in it, the one that had the coloring matter would hold its color while the one with the iron in would get brown?

A. They would both get brown in 40 years or 50 years.

Q. Would they both get brown we will say in 30 years?

A. It would depend on the conditions under which they were kept.

Q. In the same book in which you see the one brown there which was entered in September, 1892, would in ink with blue color get brown in 30 years in the same book?

A. Yes, sir.

Q. In 25 years in the same book?

A. It depends on the conditions.

Q. The same conditions that prevailed around the other entries on page 164?

A. It should.

Q. You have examined this entire book, haven't you?

A. Yes, sir.

Q. I call your attention to page 94 of Exhibit 9, an entry of Florence Lane Johnson. Do you see any coloring matter in that entry as compared to the other entries on that page?

A. The entry is brown.

Q. Is there any coloring in it?

A. Well, there is some black in it, yes, sir.

Q. No blue in it?

A. Very little, if any.

Q. That has processed how long?

A. The registration, "When registered" date is given as October, 1911.

[fol. 148] Q. Have you ever seen any handwriting submissions 25 years or more old that held their blue coloring?

A. Yes, made with dye ink and not with iron ink.

Q. None made with iron ink?

A. As I have just said on the questioned page in this book I tested the other ink on the page to see if it had blue dye and I found blue dye although the appearance of the ink is brown. It originally was blue.

Q. You found blue dye in the entry?

A. Yes, sir.

Q. Did you find blue dye in the others?

A. Yes, sir.

Q. In both of them?

A. Yes, sir.

Q. Were they written with the same pen?

A. I made no conclusion as to that.

Q. Didn't you think that was important? Did you think that was important, just yes or no?

A. It is important, yes, if you can determine that with certainty.

Q. A writing with a heavy stroke oxidizes more slowly than the writing in a lighter stroke?

A. A writing with a larger deposit of ink, which may be larger if the nibs of the pen are broader, will if the weight of the stroke is heavier.

Q. I mean a heavy stroke oxidizes more slowly than a light stroke.

A. That is so.

Q. You didn't consider that in formulating your opinion you gave the District Attorney a while ago?

A. Yes, sir.

Q. I thought you said you didn't consider whether or not the entry was made with a different pen.

A. No, I said I hadn't determined. I hadn't found positive evidence that it is the same pen point.

Q. Is it fair to assume that if you did not determine, then the making of that entry in a different pen did not enter into your opinion?

A. That is so. I gave the best of my opinion.

Q. As a matter of fact it should enter into the basis of your opinion?

A. If it is possible to determine it.

Q. As you look at that entry and the entry above it have you any opinion as to whether or not it was made with the [fol. 149] same or a different pen than the entries above?

A. I don't think they were made with the same pen, no, sir.

Q. Do you know whether the ink that went into that entry came out of the same ink bottle as the ink in the other entries came out of?

A. Of course not; I can not tell that.

Q. Don't you think before you try to form an opinion as to relative age you should first identify the ink positively? Yes or no.

A. I can not answer that yes or no.

Q. You did not identify those inks as the same positively, did you, before you assumed to give us your opinion as to the age?

A. I did as positively as it is possible to do.

Q. You don't know whether they came out of the same bottle, do you?

A. I saw no bottle so I could not tell that.

Q. You don't know whether one had been subject to oxidization longer than the other before they were used; you don't know that?

A. No.

Q. You didn't consider whether one was written with a fine or a heavy pen?

A. Oh, yes, I did.

Q. You did consider that?

A. I certainly did.

Q. The heavy pen stroke oxidizes more slowly than the light stroke?

A. That is right.

Q. And it would hold its coloring longer, wouldn't it?

A. Part of it would. However, the strokes in both the questioned lines of writing and the other lines of writing include both heavy and light strokes.

Q. Did you subject that entry to a color test?

A. I examined that entry for color.

Q. What did you do when you examined it for color?

A. But I did not make any test to see if it was changing color.

Q. What did you do when you examined it for color as you just said. Just tell us what you did.

A. I examined it with a microscope.

Q. Just a single tube microscope?

A. A binocular.

Q. One of the Osborne type?

A. No, he hasn't a binocular microscope that I know of. He has what he calls a comparison microscope.

[fol. 156] - Q. Let us not quibble about it. The one he uses has two tubes?

A. Yes. This has two tubes and you look with both eyes.

Q. You used that on this?

A. Yes, sir.

Q. Did you make more than one examination?

A. Yes.

Q. You found no color change from the first examination to any subsequent ones?

A. No, I did not.

Q. That was positive proof to your mind that the color had at least set, isn't that so?

A. Not that it was not changing, no, sir.

Q. Didn't you look for a change?

A. I made no test to see if it would change from one end of the week to the other.

Q. You told us you subjected it to two or three examinations with the microscope and you found no change?

A. That is right.

Q. Or did you look at it just once?

A. I examined it a number of times.

Q. And you didn't find any color change?

A. No, I found no color change.

Q. Then from those examinations you must have con-

cluded that the color had set, isn't that so, that oxidation had been complete there?

A. Oh, no, oxidation is not complete at all.

Q. When does the color set in an iron ink?

A. It depends on what you mean by set.

Q. When did it stop changing?

A. It never stops changing.

Q. I thought you said you examined this with a microscope three or four times and saw no change?

A. That is right.

Q. Wasn't it changing just a little?

A. It was changing, but in such a minor way I could not determine any major change.

Q. With these two-funneled microscopes you have some twenty-five or thirty thousand color slides so you can get a [fol. 151] color change that is hard to talk about?

A. We don't have any 30,000 of them, no, sir.

Q. How many have you got?

A. I don't know, a hundred.

Q. How old is the instrument you were using?

A. It is brand new.

Q. And you have only a hundred color changes?

A. Yes, that is right.

Q. Haven't they given you one of these Osborne affairs?

The Court: Don't waste time on that.

Q. At any rate, when you examined this you found no color change?

A. That is so, no major color change.

Q. How long had that ink been on that paper?

A. Long enough so that the first rapid change has occurred.

Q. As far as you know from your examination long enough for all change to stop in the color of the ink?

A. No, sir, that is not true at all. I know that ink will turn brown in time.

(Adjourned to Wednesday, February 14, 1940, at 10.30 a. m.)

New York, February 14, 1940,

10:30 A. M.

Trial resumed.

Mr. Fowler: If your Honor please, could I have this line removed. I do not wish to use it in the cross-examination?

The Court: Yes.

[fol. 152] CHARLES A. APPEL, resumed the stand and further testified as follows:

Cross-examination continued.

By Mr. Fowler:

Q. Mr. Appel, I hand you Government's Exhibit 8, baggage declaration and entry, the original. Did you do any work on that paper in and around the word "birth" and the word "date"?

A. I don't know what you mean by work.

Q. What did you do?

A. I examined it.

Q. Tell us just what did you do, give us the acts you performed to constitute that examination.

A. I looked at it with the naked eye and with a magnifying glass.

Q. And that is all you did?

A. Yes, sir.

Q. You didn't touch it at those places where the words "date" and "birth" appear with anything?

A. No, sir.

Q. Now look at the space that is filled in with the word "date." That space shows discoloration, doesn't it?

A. It shows the line smeared to some extent.

Q. All around the word is the appearance of dirt or a soil?

A. It seems to be smeared a little, yes.

Q. Around the word "birth" there is no soil, is that so?

A. Some. The whole paper is soiled, naturally.

Q. Do you say there is any soiling around "birth" to compare with the soiling that appears around the word "date"?

A. Not as much, no, sir.

Q. Is there any soiling around the word "birth"?

A. Surely. The whole paper, as I say, is wrinkled and soiled.

Q. Outside of the general soiling of the paper—what I mean is the condition of the paper around the word "birth" is the condition of the whole paper?

A. Yes, sir.

Q. But the condition of the paper around the word "date" shows more soiling, isn't that so?

A. It is a little more smeared around the word "date".

Q. Do you consider that in arriving at whether or not the writer of the ink writing on that paper wrote the pencil [fol. 153] writing? Just yes or no. Did you take that into consideration?

A. There is nothing to take into consideration.

Q. Is that your answer?

A. Yes.

Mr. Fowler: May I show this to the jury, if your Honor please?

The Court: Yes.

(Mr. Fowler hands Exhibit 8 to the jury.)

Q. Mr. Appel, a light erasure with a sponge rubber that would not mar the paper but would remove pencil writing could leave a smudge like appears around the word "date"; couldn't it?

A. It doesn't look like that to me.

Q. It could, couldn't it?

A. It might.

Q. Your answer is it might?

A. Yes, sir.

Q. You identify these two words as in the handwriting of the writer of the ink words on this paper by certain very definite characteristics in the making of certain letters, is that so?

A. Yes, sir.

Q. The "b" shows a looping for instance which is not to be found in ordinary handwriting, is that so?

A. The shape of the "b" is characteristic of the writer of the writing on this paper.

Q. There is a very definite similarity between that "b" and the "b's" on that page?

A. Yes, sir.

Q. And there is a very definite similarity between the "r" in that "birth" and the "r's" on that page?

A. That is so, yes, sir.

Q. And there is a very definite similarity in the crossing of the "t's" in that word "birth" and the word "date" with the crossing the "t's" on that page?

A. There are no other "t's" on this particular page which are crossed exactly like that. The writer of this writing has two ways of crossing "t's". In this one he does it as in Europe.

[fol. 154] Q. The "t" that is crossed at the top is crossed the same as the "t's" are crossed in the ink writing?

A. Yes, sir, that is so.

Q. And the "a" in the word "date" is made with that same peculiar motion that you have described, and it appears in the ink writing on that paper?

A. Yes, sir.

Q. If anyone experienced in handwriting would set out to imitate that ink handwriting on that paper they had a specimen of the "b" and a specimen of the crossing of the "t", of the "r" and of the "a" right there that were very definitely Wiener's?

A. Except they didn't have the "t" in the word "birth."

Q. That had everything but that, isn't that so?

A. They had some other things, yes, sir.

Q. Did you examine other exhibits of handwriting conceded to be made by this defendant at the same time you examined that Exhibit 8?

A. I did.

Q. And those other exhibits had this European crossing of the "t" in them, didn't they?

A. Yes, sir.

Q. Do you see that these two words "birth" and "date" are the only two words on Exhibit 8 that are really material to this indictment?

Mr. Werner: That is not so, and I object to it.

The Court: The objection is sustained.

Mr. Fowler: Exception.

Q. Those two words have the man stating that he has lived continuously in this country from his birth to the present date of that paper?

A. I don't know. I didn't pay any attention to the meaning of the words on the page.

Q. You never read the paper?

A. No, sir.

Q. Are you serious in that, sir?

A. Yes, absolutely.

Q. What department do you work for?

A. I work for the Federal Bureau of Investigation.

[fol. 155] Q. Now, last night the last question I asked you and the answer you gave me was this: "As far as you know from your examination long enough for all change to stop in the color of the ink?"

A. No, sir, that is not true at all. I know that ink will turn brown in time." Do you remember where we were when we left off now?

A. Yes, I think I remember very well.

Q. All ink will turn brown in time?

— All iron ink.

Q. What turns it brown?

A. The oxidation of the iron.

Q. The more iron in the ink the sooner it will turn brown?

A. Not necessarily; it may take longer with more iron in it.

Q. But the browner it will turn?

A. Yes, sir.

Q. Then your first problem was to establish the identity of the ink used in these entries above this questioned entry and the ink used in the questioned entry, isn't that so?

A. That is right.

Q. What did you do to establish the identity of those inks? Just tell us.

A. I tested them with various reagents.

Q. What reagents did you use?

A. Potassium ferrocyanide.

Q. What did you do with the potassium ferrocyanide?

A. I took a very small drop of it and placed it on a portion of the line of writing.

Q. Of which writing?

A. Of the line of writing which contains the name "Wiener" and also the lines of writing of the writing above that name, and the reaction——

Q. Wait a minute. What reaction did you get?

Mr. Werner: May he continue with his answer?

Mr. Fowler: He may go on.

Q. I was going to ask you what reaction did you get from the entries above the questioned writing?

A. It turned the line blue, which is the reaction for iron ink.

Q. And what did it do to the other?

A. It turned it blue.

[fol. 156] Q. Did they both turn blue to the same extent?

A. I don't know what you mean by that.

Q. Were they both the same color of blue after the test?

A. Yes, sir.

Q. They were; exactly the same color of blue?

A. Yes, sir.

Q. What caused that change?

A. The combination of the chemicals.

Q. Tell us what caused the writing to become blue?

A. Because of the iron in the ink line on the page combining with the potassium ferrocyanide the line became blue.

Q. Did it neutralize the iron?

A. I don't believe that is the proper chemical term. It combined with it.

Q. If it turned blue, isn't that proof to your chemical mind that it neutralized the iron, allowing the provisional color to come through?

A. It combined with the chemical to form a new compound, which is blue in color.

Q. Would it show blue if the iron were still active?

A. Yes, it would, regardless of the age of it.

Q. What was showing blue?

A. The new chemical compound formed by the blue and the potassium ferrocyanide.

Q. Did it run—could you diffuse it over the page?

A. No, very little.

Q. How about the questioned entry? Could that be diffused over the page?

A. Could it be?

Q. Did you diffuse it over the page?

A. Not with this test.

Q. Did you diffuse it with any test?

A. I touched it with a drop of distilled water to see if it would dissolve readily.

Q. Did it?

A. To some extent.

Q. Do you try for diffusion with water?

A. Yes, sir.

Q. On ink that is forty years old?

A. Yes, sir. One of the reasons I did that was to see if the entries above the Wiener entry had blue dye in them, and I found that it did.

[fol. 157] Q. Both of them had blue dye?

A. Yes, sir.

Q. What did you do along the quantitative line of analysis?

A. Quantitative?

Q. Yes.

A. Nothing.

Q. You don't know what proportion of iron was in the entries above the questioned entry and what proportion of iron was in the questioned entry?

A. No, sir; there is no way of telling that.

Q. Would you tell me—you don't, do you?

A. I don't.

Q. I think you volunteered the information there is no way of telling the amount of iron or coloring matter in a written ink by chemical analysis?

A. That is right.

Q. Do you know that by a proper chemical analysis it is possible to determine the make of an ink?

A. I know it is not.

Q. You say it is not?

A. Yes, sir.

Q. Have you read Mitchell on "Inks: Their Composition and Manufacture"?

A. Yes, sir.

Q. Do you disagree with him?

A. Not at all. If I had a bottle of ink it could be tested by chemical analysis and you might be able to detect the chemical formula. Provided you had all of the chemical formula you could determine which formula it was and hence which manufacturer. There are few people who have those formulas, but the Bureau has probably a more complete list of those formulas than any person or organization, which was furnished by the manufacturers of ink, but not all. Here we don't have a bottle of ink, but we have a line of paper, and there is not a sufficient amount of the chemical there for a quantitative analysis.

Q. I am now referring to page 201 of Mitchell on "Inks Their Composition and Manufacture". First, before I say that, you do tell us that every ink on the market has its own chemical formula?

A. That is true; but with reference to iron inks the formula [fol. 158] as for different manufacturers are practically the same.

Q. You say that all iron inks have practically the same formula?

A. Practically the same formula, which follows the formula proposed and suggested by the National Board of Standards which tests inks for the government.

Q. I am now referring to page 201 of Mitchell's book:

"If writing from various sources is subjected to a systematic series of tests, differences in that done with different inks, or even at different periods, will frequently be observed."

You agree with it?

A. Yes, sir.

Q. For instance, with the reagents used by Traill"—did you use his reagents?

A. Who is it?

Q. Traill?

A. I don't know.

Q. Did you ever hear of him?

A. I have read that book.

Q. I didn't ask you that. I asked you did you ever hear of him.

A. I probably have. I don't recall it now.

Q. "For instance, with the reagents used by Traill, fifty envelopes were tested, and the writing on no two of them gave identical results."

Would that be any proof to you that your statement it is impossible to tell the chemical formula of a written ink is correct?

A. That would be proof to me that my statement is correct. Any statement—

Q. All right, that is an answer.

A. You don't wish me to finish my answer?

Q. No. That doesn't convince you?

A. No, because—

Q. All right. Never mind the "because." "Robertson and Hoffman used the following reagents for distinguishing between writing done with different kinds of ink." Now what did you do in there to distinguish between these inks or make them similar?

A. What is that?

[fol. 159] Q. What did you do? Tell us what you did physically?

A. I tested the lines.

Q. That is your conclusion. I want the facts.

A. It is the fact that I tested them, and that is not a conclusion.

Q. What were the acts, you stated you had made a test.

A. I treated the lines with different chemicals, as I said, one of which was ferrocyanide and the other sodium hydrate.

Q. From those two you had then blue?

A. No, sodium hydrate test turned it red.

Q. Both turn red?

A. Yes, sir.

Q. What did that indicate to you?

A. That it was iron.

Q. Both were iron inks?

A. Yes, sir.

Q. You don't know what the quantity was in the alleged old entry and the alleged new entry?

A. That is true.

Q. Without knowing the proportion of the iron could you make any scientific estimate of the age of that questioned entry?

A. I could and did.

Q. You can do that?

A. Yes, sir.

Q. Then it is a possibility to estimate the age of ink from a chemical analysis, isn't it?

A. Only to the extent which I have described.

Q. Now, then, if you had an ink, for instance that appeared the same as this questioned ink; you could tell us its age by the test you go through. Provided it is an iron ink it would turn, red, white and blue just as you told us yours did. Would you assume to tell us the age of the ink if you gave us a sample?

A. I have not told the age of this ink. I simply said one ink was lighter than the other.

Q. I asked you if it were possible in your opinion to tell us the age of ink by a chemical analysis and you told us it was.

A. I did not.

Q. What is your answer to that?

A. My answer to that it is necessary to know the conditions under which the ink has been kept before you can tell the age of it.

[fol. 160] Q. Then the ink itself from the chemical analysis gives you nothing to estimate its age, is that right?

A. That is right except that—

Q. I beg your pardon for interrupting you.

A. —except an iron ink turns brown, indicating that it is old:

Q. Keeping right on with this chemical analysis, Mr. Appel, we both agree, do we not, that the chemical analysis of an ink will determine its age, is that right?

A. The chemical analysis determines that it is iron ink and therefore the brown color is due to oxidization which shows that it is old.

Q. Will you answer my question?

A. I believe I did.

Mr. Fowler: Will you read him the question.

Q. And I ask you that you answer the question just yes or no.

A. I don't think so.

Mr. Fowler: Will you read my question, please?
(Question read.)

Q. Now we both agree, do we, Mr. Appel, that no chemical analysis will in and of itself determine the age of ink, is that so?

A. That is right.

Q. Mitchell named eight reagents, the pronunciation of the reagents I will not attempt, if your Honor please, and he states, this is on page 203, by means of those eight reagents Mitchell was able to distinguish between one of two inks. You say he could not do it?

A. I didn't say any such thing.

Mr. Werner: I object to Mr. Fowler reading statements in the form he is reading them. He may ask, Do you agree with the statement, but he may not say "so and so states that."

[fol. 161] Q. Do you agree that Mitchell could determine the use of those inks by the use of those reagents?

A. He does not state that. He is talking about a dye ink as distinguished from an iron ink.

Q. Then there is no chemical test that you could base any opinion on, any sound opinion as to the age of ink?

A. Any chemical test?

Q. Yes.

A. Only insofar as it determines it is an iron ink and then the fact that it is a brown, that is a chemical test, of

course, which determines it is an iron ink and then the fact that it is brown shows it is old. It does not show how old.

Q. Let us understand each other and then we will move into the brown field. Is there any chemical test that you can apply to a test of ink writing, a chemical test, not color, that will determine its age, yes or no?

A. A color test is a chemical test.

Q. I am talking about reagents, your reagents that you said you used, did they determine the age of the ink?

A. To a certain extent.

Q. To what extent?

A. To the extent that they were usually an iron ink and the brown color is due to the aging of the ink.

Q. You told me at the start of this examination that the quantity of iron in the ink would have an effect upon the color, the deepness of the brown, that it would turn, do you remember that?

A. Yes, sir.

Q. Then to compare the brown in one ink with the brown in the other, you would have to have an ink with the identical quantity of iron in both instances, to make a fair comparison, wouldn't you?

A. Not absolutely necessary, no, sir.

Q. Wouldn't you be excluding a little bit if you didn't work with the same quantity of iron in each fluid?

A. No.

Q. That is your answer?

A. Yes, sir.

[fol. 162] Q. Now to get right down to the questioned entry as compared with the entries above it. Do you know now whether the ink that wrote the entries above it had the same amount of iron in it as the ink that wrote the question entry?

A. No, I do not.

Q. Does the lightness or heaviness of a stroke have any effect on the oxidization, that is the speed of oxidization of ink?

A. Where there is a larger amount of ink deposited—

Q. Just yes or no.

A. I will have to answer this question in the only way in which I know.

Q. All right. Go ahead.

A. Where there is a larger amount of ink deposited there

is more iron naturally because of a large amount of substance, whether the lines spread out or blot, there is the least substance left on the paper, the oxidization is slightly different, depending on whether the line is thick or thin. Other than that the agents are similar in the two others.

Q. Then you say that a heavy stroke dries just as quickly as a light stroke?

A. The surface of it will. It won't show exactly the same color.

Q. That is what I am coming to, the color of the change will not be the same?

A. Not exactly the same but they both show a browning.

Q. In recent ink contrasting the heavy stroke with a light stroke, but made at the same time, is it your testimony then that the stroke should be the same color?

A. The stroke of a light line is not the same as that of a heavy line.

Q. What is that?

A. The color of a light stroke is not exactly the same as a heavy stroke.

Q. Didn't you just tell us they were about the same?

A. I said exactly.

Q. Well, is there a marked difference between the color of a light stroke and a heavy stroke, both made at the same time, by the same pen?

A. There is some difference.

Q. What?

A. There is some difference, yes, sir.

[fol. 163] Q. Will you describe that difference?

A. Well, one is a deeper color than the other.

Q. Can the same pen make a light stroke and a heavy stroke in the same hand?

A. Certainly.

Q. But it has got to be intentionally so, isn't that so?

A. Not at all, it is unconscious.

Q. A man can write a light stroke and a heavy stroke with the same pen, with the same effort?

A. Every man does. His hand puts more or less of a pressure as it moves the pen across the paper.

Q. I mean a general average, taking in the light and shaded lines.

A. You are asking about the heavy lines as compared with light lines?

Q. I will assume your answer to my question, that is true.

Taking in a general average shade, a light line, will a man write the average light and heavy with the same pen, without an effort?

A. One line of writing may be heavy and another light. Usually he does not.

Q. He does not?

A. No, sir.

Q. I am not quite clear that we agree on this speed of oxidization, Mr. Appel, between or in a heavy stroke and a light stroke, which will oxidize the quicker?

A. Well, where the material is more exposed on the surface, on the paper, that material will change faster than where it is buried.

Q. Take a paper where both the light and the heavy writing is on the same surface and exposed to the same conditions, which will oxidize the faster, the heavy or the light stroke?

A. The light stroke oxidizes faster.

Q. And that brings the ink down to a black color quicker?

A. Black color?

Q. Yes, if it is an iron ink.

A. No, sir.

Q. If it oxidizes doesn't it set black?

A. Usually it is black to start with.

Q. Some blue color in it?

A. Yes, sir, blue black.

[fol. 164] Q. As it sets it darkens?

A. To some extent.

Q. Then the light ink should be the darker, I mean in color?

A. If there is less ink there, of course that is not darker. The portions where there is more ink is darker at the beginning of the aging as well as at the end.

Q. Where you have got a heavy stroke, Mr. Appel, you have more ink?

A. Yes, sir.

Q. You have got more iron, assuming this ink is iron ink, you have more iron?

A. Yes, sir.

Q. It takes longer to oxidize?

A. Yes, sir.

Q. Takes longer to get away from a light blue color and come down to black?

A. No, because it is already darker.

Q. But it takes longer?

A. It has more material and therefore darker at that place.

Q. It is darker?

A. Yes, sir.

Q. You mean black or dark blue?

A. Both.

Q. And are you telling us that although the heavy stroke takes longer to oxidize than the lighter stroke, with the same pen, made at the same time, under the same conditions, will be darker?

A. I didn't say that. You are trying to get me to say that, but I have not said it yet.

Q. You say it will be lighter?

A. It depends on how much material is left there. The more material, the darker it is to start with, also to finish with.

Q. What is oxidization in writing ink?

A. Sir?

Q. What is oxidization in writing ink?

A. Oxidization?

Q. Yes.

A. A combination of iron with oxygen.

Q. What does it do to the ink?

A. Turns it brown.

Q. It don't turn it black?

A. I don't think it does. The oxidization turns it black?

Q. What does?

A. It simply loses lustre. It soaks into the paper and loses its lustre.

Q. Doesn't it turn black because the iron in the ink takes command over the coloring matter in the ink?

A. No, I don't think so.

[fol. 165] Q. That does not happen in ink?

A. I wouldn't say one takes command of the other, no, sir.

Q. Do you agree with this, under ordinary conditions a good ink in the Summer will appear to be black at the end of a few weeks and in the Winter this degree of blackness will be reached in one or several months?

A. It depends on whether he is writing about iron ink or dye ink.

Q. This is iron ink. The first step in the darkening of

iron inks are much more rapid than the lighter ones. Do you agree with that?

A. Absolutely.

Q. And the first depths of the darkening ink down to black?

A. It darkens, yes, sir.

Q. That is the oxidization starting, isn't it?

A. No, sir, probably not.

Q. Doesn't oxidization start in ink the instant it is exposed to air?

A. I imagine so.

Q. When the ink is spread on the paper than the oxidization starts that is there and the color darkens down to black at the end of a few weeks?

A. It depends on whether the paper is exposed or not, how the changes occur.

— Assuming the paper is exposed to oxygen.

A. Then there is a rapid change at the start.

Q. And the rapid change is what?

A. Well, it darkens.

Q. And you say that the light stroke darkens the same as a heavy stroke?

A. No, I didn't say that.

Q. You say that the heavy stroke darkens faster than the light stroke?

A. No, I didn't say that either.

Q. They darken about the same?

A. I think the relative appearance of the heavy stroke and the light stroke are maintained about the same. The surface of the chemicals change about the same, so that the relationship between the light part of the line and the heavy part of the line is maintained throughout.

Q. So the color would be the same, the color would appear the same?

A. The color is not the same. The relation between the [fol. 166] dark portion of the line and the light portion of the line is retained, both of them change.

Q. So to the naked eye they would present about the same color?

A. What do you mean? I have just finished saying the light portion of the line is a slightly different color from the heavier portion of the line, they are not the same.

Q. The heavy portion of the light line would be about the same as the heavy writing?

A. One is a little lighter than the other and stays a little lighter than the other, although both get darker.

Q. What makes the difference between the heavy portion and the light portion if it is not in the speed of oxidization?

A. The amount of ink deposited there.

Q. Therefore the more ink the darker it will remain?

A. Yes, sir.

Q. And the less ink the lighter it will remain?

A. Yes, sir.

Q. And then there will be a difference in color?

A. I said so.

Q. Between the light writing and the dark writing, written at the same time?

A. That is right.

Q. And would you say the heavier ink would take longer to oxidize, or oxidization is quicker the more ink there is there?

A. The more ink there is there it takes longer to fully oxidize.

Q. If it takes longer the more fully to oxidize than to change color than the light ink—

A. No, there is much more of it to change, that is all.

Q. Then they would be the same, isn't that fair?

A. No, sir. What do you mean the same?

Q. The heavy writing and the light writing would be the same, there is only more ink in the heavy writing and the oxidization is quicker in the lighter writing?

A. The color differs, one being deeper than the other, because there is more there.

[fol. 167] Q. Now let us get back. The very fact that there is more there, isn't that proof of oxidization slower, it takes more time, or what is the significance then of there being more there?

Mr. Werner: That is the second time you have been over this.

Mr. Fowler: If your witness would answer directly I could do it at once.

The Court: He answered directly.

Mr. Fowler: Can I have an answer to the last question so as to settle that either in my mind or in his?

Q. Have you got the question?

A. I don't know whether I have or not. I don't know

exactly what you mean by "there is more there," because there is more of a deposit there?

Q. I don't blame you for not getting that one. I cannot even answer that question myself. Mr. Appel, let us get that question down. Does the amount of ink, the relative amount of ink in writing have any bearing on the speed of oxidization or the setting of the color, a black color, I am not talking about brown, black color.

A. The black color develops in the ink if there is more of it and naturally it takes longer for all of it to develop, but it is changing whether the line is light or heavy, in the same way.

Q. I see. But then, in the case of heavy writing, inasmuch as there is more ink there to oxidize, the color change will be more rapid in the light writing, would it or wouldn't it?

A. I don't think it is any more rapid if ink is spread out in a thin wide line so it is more exposed to the air why it will oxidize a little bit more rapidly than if concentrated in a thick, heavy, small, narrow line, but the changes on the surface of that chemical are the same. It is only because there is more material in one place than the other that there is any difference, and that difference is only observable if you wait until all of the changes have occurred.

[fol. 168] Q. Do you tell us that to the naked eye that light writing sets darker in a shorter time than the heavy writing? Did you tell us that?

A. I didn't say that at all.

Q. You said it oxidizes faster?

A. I believe I explained it clearly.

Q. You say it oxidizes faster, don't you?

A. I didn't say that.

Mr. Fowler: Would you please read, Mr. Stenographer, Mr. Appel's answer to the second answer back from the last one I just got, where he went into the discussion of the oxidization of light and heavy writing?

(Record read.)

Q. Now, Mr. Appel, is there any doubt in your mind you told us that if a thin surface of ink is spread on the page under the same conditions with a heavy surface of ink that the thin surface will oxidize more rapidly than the heavy?

A. I don't think I said that.

The Court: I think you have been over this two or three times. It is a matter of when the mass of oxidization begins.

The Witness: Yes, sir, and it changes on the surface the same. Of course there being more in one, to change it to the bottom ink deposit, why it takes longer for the change to reach that point, that is all.

Q. But you did say that a thin line, written by the same pen that writes a thick line, will oxidize the same as a thick line; is that your testimony now?

A. A complete change will occur more rapidly. The change will be completed quicker in the thin line than in the thick line.

Q. And when will it be completed in the thin line so far as color is concerned, without considering brown now, we [fol. 169] are just concerned with black; when will that be completed?

A. Will the oxidization be completed?

Q. Yes.

A. That oxidization is never completed.

Q. So far as black color is concerned when will it be completed?

A. The change to a black is complete when the line is black. I don't know what you mean.

Q. The thin line will be a little bit ahead of the heavy line in its color change?

A. No, it is not ahead of it.

Q. But the oxidization with the thin line goes along faster than in the heavy line?

A. It is not going along faster; there is more of the heavy line to oxidize.

Q. It takes longer for it to accomplish it?

A. For the whole thing, yes, sir.

Q. But the color will be the same?

A. The darker appearance of the heavy line will be deeper and darker than the light, thin line.

Q. Even in the case of the shading of the line?

A. That is true.

Q. I call your attention to the two signatures of Matthew Earle. Do you see that (handing)?

Mr. Werner: Matthew Earle.

Q. Matthew Earle. Do you see those?

A. Yes.

Q. Turn over on the other side of the page, and you will see a scrawl that has been identified as intending to mean the word "none".

A. Yes.

Q. Now during your testimony as to whether a light line oxidizes faster than a heavy line or shows any change in color, and noting the color there of those three writings, do you say those three writings were made by the same pen?

A. You wish me to state now with reference to a pen, although we are talking about ink.

Q. Pens have some relation to ink.

A. Not to the color of the ink.

[fol. 170] Q. They have no bearing on the color of the ink?

A. Very little.

Q. An ink with more than the average of iron in it, what effect does it have on the steel pen and the color of the ink?

A. The ink might chemically attack the iron so as to combine with it.

Q. Then the pen has something to do with the ink?

A. Very little.

Q. Go ahead.

A. For me to determine whether the color of the word "none" on the face of the exhibit is exactly the same as the color in the two names "Mathew Earle" signed on the back of the exhibit, it will be necessary to examine these in the laboratory with proper instruments. You can not look at it and reach such a determination.

Q. What instrument would you use in such an examination?

A. I would use a microscope.

Q. Were those words written by the same ink?

A. I could not tell by just glancing at the document. They appear to be similar to me.

Q. Is the handwriting similar?

A. I could not tell that either by glancing at the document.

Q. So your answer to that is that you won't say?

A. I can not say.

Q. Your answer is you can not?

A. That is right.

Q. You were examining handwriting on the same page when you examined the questioned entry and the entries that followed, weren't you?

A. In the book?

Q. Yes.

A. Yes.

Q. On the same kind of pages, is that right?

A. That is right.

Q. You examined it under a microscope, did you?

A. Yes, sir.

Q. What tendency has a recent writing on the edges when it is made on old paper?

A. It depends entirely on the paper.

[fol. 171]. Q. Well, this paper in Government's Exhibit 9, the entries are from 1880 to 1896—at least 60 years old the book is—what tendency has recent writing when made on old paper like that?

A. It depends entirely on the paper. The paper in that book is a fine quality of bond, hard finish paper, not 60 years old, but the entries run up to 1896 and 1898 or so, and around 1900; that is 40 years ago, not 60. In an old paper there is some tendency for the ink to spread out from the line and become absorbed in the paper in different ways.

Q. You say the book is 40 years old and not 60?

A. It can not be if the entries were made in 1896.

Q. Can you put an 1880-entry in a book in 1940 that is only 40 years old?

A. You can, of course.

Q. Can you find an entry that was made in 1880 in a book that is 1940, that is only 40 years old?

A. That is true.

Q. You can?

A. I don't understand.

Q. Don't you know before you can put an 1880-entry in a book in 1940 that the book must be at least 60 years old?

A. That is right, yes.

Q. Now then, you had paper 60 years old, didn't you, when you were looking at the book Exhibit 9?

A. Some of it at least.

Q. Did you look at the edges of this questioned writing?

A. Yes.

Q. Did you?

A. Yes.

Q. Did you find anything?

A. Yes.

Q. Was it feathered?

A. To some extent.

Q. What did that tell you, what did that indicate to your mind?

A. Well, it indicated that the paper on which it was written at that point absorbed the ink in such a way as to cause it to spread out from the line, that is all.

Q. Did it indicate recent writing?

A. It was not sufficiently important for me to base any conclusion upon it.

Q. Isn't that one way of determining recent writing?

A. If it had—

[fol. 172] Q. Is that one way to determine recent writing on old paper?

A. Not necessarily.

Q. It is not one of the tests?

A. It is one of the things to be taken into consideration.

Q. You took that into consideration?

A. I did.

Q. Because you found it was feathered on the edges?

A. No, I took it into consideration anyhow.

Q. Did that indicate a recent writing?

A. The fact it was feathered?

Q. Yes.

A. Not necessarily. The page at that point is near the edge, paper that has been handled and bent, and some is more apt to show this effect than other portions of the same paper. I did not find a sufficient amount of evidence in this way to base any opinion upon it.

Q. Did you look for feathering on the line on the line above the questioned entry?

A. No; because this evidence did not seem to me in this particular instance to be important.

Q. The feathering of writing on old paper is not considered by you in comparing the age of the entries above the questioned entry and the questioned entry, is that your testimony?

A. I said this effect in this case was not of any importance.

Q. Mr. Appel, you testified yesterday that you had found several entries in that Government's Exhibit 9 that showed the same coloring and appearance in the same book on the same kind of paper of the questioned entry. Do you remember?

A. Is Exhibit 9 this birth register.

Q. Yes, sir.

A. Yes, sir.

Q. How long did you have that Exhibit 9 in your possession to work on?

A. About two weeks, I think.

Q. Was it then marked, all those two weeks, as Exhibit 9 for identification?

A. No, sir.

Q. It had no 9 on it at all?

A. I didn't see it.

[fol. 173] Q. Now, you did testify about these four entries, two of them in 1938 and two of them in 1939, that they had the same general appearance as this questioned entry, is that right?

A. That is right.

Q. Isn't it fair then to state that you were telling us in your opinion this questioned entry is of the same age as the 1938 and 1939 entry?

A. No, sir.

Q. Isn't that what you wanted the jury to believe?

A. No, sir.

Q. Why did you say 1938 and 1939, why did you take those entries and say they were the same color and same condition as the questioned entry if you didn't want the jury to conclude that you were telling them that this questioned entry was made in 1938 or 1939?

A. I said it because I was asked.

Q. Did you go over this case and your work with the district attorney who was asking these questions?

A. Naturally; that is right.

Q. Did you make a report to him?

A. Yes, sir.

Q. In writing?

A. Yes, sir.

Q. Have you got a copy of it with you?

A. No, I have not.

Mr. Fowler: Has the district attorney that report?

Mr. Werner: Yes.

Mr. Fowler: May I have it?

Mr. Werner: Of course you can not have it; it is a confidential report.

Q. Did he ask you questions from that report—I mean the questions he asked you followed the report, did they not?

A. They followed the report and the conversations I have had with him since I arrived here for this trial.

Mr. Fowler: I can not see any great confidence in this communication and I ask for it.

[fol. 174] Mr. Werner: It is a confidential communication, and I do not desire to let counsel have it.

The Court: No, you cannot have it.

Mr. Fowler: An exception.

Q. And from the testimony of yours yesterday is it fair to assume that you can tell us the age of inks or the age of writings of substantially the same appearance as the '38 or '39 entries in this book, Government's Exhibit 9?

A. I don't understand your question.

(Question read.)

Q. That is the 1938 or 1939 entries you spoke of yesterday. I have the list of them here.

The Court: We will take a recess. I would like to see counsel in chambers for a moment.

(The following took place in the Court's chambers, not within the presence of the jury):

The Court: I want to advise each of you that somebody has been writing to the jurors in connection with this case. Here is a postcard addressed to Mrs. Henrietta Lewis, 50 West 72nd Street, New York City, N. Y., mailed February 10 at 5:30 P.M. It says: "Dear Mrs. Lewis: I understand you are prepared for jury duty. Perhaps you don't understand why they are making a crusade on all leaders of the communist party & different radicals? Is it not a bit singular that it took so long since the Roosevelt administration is in office? The truth is that it is elaborate that they are preparing for a new war, so the Dies committee seeks flimsy passport charges against the communist leaders. Truly it is plausible that the government in 1914 done the same thing with Debs it is not a conjecture that they are planning with [fol. 175] there intrigue again. Have no confidence in witness such as the Dies Committee that are convict ex convict and fugitive murderer that even the papers had to admit. Why even a certain governor had to admit for his own political advantage that the Dies Committee is going against the

Bill of Rights. Mrs. Lewis it is truly a mistake to prejudice against one own political opinion if one is logic. I am sure Mrs. Lewis that you will be lenient to this man even though his political views might be different than yours justice is in your hands & and I am sure your going to use your option in the proper manner

Verily

I sincerely thank you
a friend."

(Signed) "John E. Edward"

Mr. Fowler: I don't like that. I think that juror ought to be excused and one of the alternates come in. If I were on a jury and got a thing like that it would set me so dead against that defendant that I could not possibly live up to my oath. The thing would so prejudice me. And I am asking that that juror be excused and one of the alternates be put in.

The Court: It might disqualify every juror if we took that view of it. Anybody could write a card and disqualify any juror.

Mr. Fowler: If anybody did attempt to work such a disqualification—it is time to get after this fellow who wrote this, it seems to me.

The Court: If you let one juror off on that kind of a thing someone might disqualify every juror.

Mr. Werner: This man who wrote that is sympathizing with this defendant, Mr. Fowler's client.

[fol. 176] Mr. Fowler: I persist in my motion.

The Court: No, I will not dismiss the juror at this time.

Mr. Fowler: I respectfully except. Is that No. 1 juror?

The Court: Yes.

Mr. Fowler: When did this turn up?

The Court: She got it and gave it to me this morning. It is postmarked February 10, 5:30 P. M. That was last Saturday.

Mr. Fowler: When did she get it?

The Court: She probably got it yesterday morning.

(Card marked Government's Exhibit 38 for identification.)

Mr. Fowler: In view of the contents of this postal card now marked Exhibit 38 for identification I would ask that this juror, Mrs. Henrietta Lewis, to whom this postcard is addressed, be questioned by your Honor and that the other

jurors be questioned to ascertain if this Mrs. Lewis has directly or indirectly communicated to anyone on the jury the fact that she received this card or has communicated what was in it or anything concerning it, and if she did then I am going to move for a mistrial.

The Court: I will deny the motion. I will direct each of the jurors to disregard it. It is the same as if they had read something in the newspapers, the Daily Worker or one of the conservative papers. They might find something very like it there. I think she is an intelligent woman and it will not influence her.

Mr. Fowler: My purpose in that is that through the medium of a card like that just what I have purposed to keep out of this case has been put into it. The only reason I [fol. 177] took this case was to see that this man if convicted is convicted only on the evidence. I have told this fellow from the start that that was my interest. I don't want to make a hero or a martyr of anybody. I think this man should have more respect for law by reason of the trial that he has had here so far than he ever had in his life.

The Court: I will consider it further, but I don't think I will declare a mistrial.

Mr. Werner: If on another trial another sympathizer should send a similar postal card then we would have the same situation.

Mr. Fowler: We have two alternates chosen and sitting on this jury just for that purpose.

May I except to your Honor's ruling.

(The proceedings were resumed in the court room within the presence and hearing of the jury, as follows):

CHARLES A. APPEL, resumed the stand and further testified as follows:

Cross-examination.

By Mr. Fowler (continued):

Q. Now, Mr. Appel, I had asked you this, if it is not a fair assumption when you cite entries in Government's Exhibit 9 at page 149 which was made in 1938, at page 102 which was made October, 1938, on page 89, which was made March 31, 1939, and on page 23, which was made July 12, 1939,

and then state that the questioned entry shows approximately the same freshness, isn't it your intention to tell this jury that in your opinion the questioned entry was made at or about the same time as those cited entries?

A. No, sir.

[fol. 178] Q. That was never in your mind?

A. It was not.

Q. Do you say that if general specimens of handwriting of the same appearance, of the same iron ink, as these instances you have cited, these instances being of known dates, that you can tell this Court within ten years when any one of those specimens was written? Do you say so, giving the specimen any examination you please, chemical, physical, microscopical, any examination you please, do you say so?

A. It depends entirely upon the specimen.

Q. Now, what does that mean?

A. I might ask you what you questioned me.

Q. What part of my question don't you understand?

A. Are you asking me in a general way whether I can tell within ten years the relative age of an entry?

Q. No, sir. I am asking you if you can tell by means of any examination you know of or can have the specimen submitted to by others, whether or not you can tell within ten years the date that the specimen was written that I will submit to you, which appears to be the same to you as these specimens I call your attention to, which were written in 1938 and 1939?

Mr. Werner: I object. Mr. Fowler is talking about something that he says he has.

The Court: Can you answer the question?

The Witness: He is referring to some specimens I don't know about, and I can not tell anything about it.

Q. If the specimen appears the same as the specimens you called the Court's attention to in 1938 and 1939, just as you say the questioned entry is, if there is just as much of a likeness, can you assume to tell us their age within ten years of their proven age?

A. If what specimens appear?

Q. The specimens I will ask the Court's permission to submit to you for any test?

A. I wouldn't want to make any test.

[fol. 179] Q. You say you would not make such a test?

A. I would prefer not because of course I would have no

way of knowing the conditions under which they were prepared or kept. For all I know you might submit some paper that is not—that is prepared in a way not at all comparable to this for the purpose of tricking me. Naturally I wouldn't want such specimens.

Q. If I pick up eight or ten specimens from Exhibit 9 and conceal the date of their entry completely, the book is kept the same for all specimens and the paper is all the same, will you undertake to tell us the dates those specimens were made?

A. I have already stated that I can not tell the date when any entries in the book were made. The only thing I have stated is the relative difference in age.

Q. That is just what I am asking you to do now, to state the relative age of ten specimens that I shall pick from that book with their dates covered completely, provided you promise not to use an infra-red light on them and look through the covering. Would you do it without the infra-red light and assume to tell us within five or ten years when they were made?

A. I have not given any such testimony. However, the particular entries you were referring to I may have examined. If you will point them out I will tell you what I know about them.

Q. I will take that chance, but not until the date is covered, and when the date is covered will you tell the jury when the specimens were made with respect to the specimens I will show you?

A. What specimens?

Q. The '38 and '39. We will start from something definite. Will you do it that way?

A. I can not assume that. I do not know they are known.

Q. You were assuming that when you compared the questioned entry with them.

A. Not at all.

Q. Then what is the value of your testimony?

The Court: Don't argue.

[fol. 180] Q. I am repeating the offer. Will you do what I ask you?

A. I don't know what you were asking.

Mr. Werner: First, Mr. Fowler says he wants the witness to tell the exact date, and the witness has repeatedly testified—

Mr. Fowler: I object to this argument while the witness is on the stand. I may have to ask him some more questions and the argument may be very valuable to him. I object to the speech.

The Court: I will sustain the objection.

Mr. Fowler: The objection to what?

The Court: He has said he doesn't care to try that on the conditions you impose.

Q. Will you do that on your own conditions?

A. I don't know exactly what you want me to do. If you want me to compare some entries that you cover the dates on when they were made, with the entries made in 1938 that I referred to, I will look at them. So far as comparing them and determining the exact date when they are made I can not do that. I have not done that with the other entries.

Q. How near can you come—you use the word "exact"—how near can you come in years?

A. I did not use the word "exact."

Q. Yes, you did. Pardon me for contradicting you. Do you say you didn't use the word "exact"?

Mr. Werner: What difference does it make?

The Court: Let's get along.

Q. I don't ask you to make an exact estimate. I asked you how near you say you can come to these established specimens of 1938 and 1939; within how many years can you come?

A. That I don't know. I might be able to say they were very much later, but if the entries you refer to have not [fol. 181] turned to brown, being in iron ink, those entries not having — to brown, it would be impossible for me to say within a number of years when the entries were made, because the brown does not develop for some time.

Q. The entries of 1938 and 1939 that you called the Court's attention to are not brown?

A. No, sir.

Q. Unless the entry is brown you can not come within many years of telling us the date of entries that you compared with the 1938 and 1939 that have not turned brown?

A. The number of years, that is right.

Q. It is fair to assume from your testimony that you were not trying to fix the date of the entry of the questioned entry at any date within a great number of years or within a number of years of 1938 or 1939, isn't that so?

A. I of course attempted to establish it so far as I was able to do so. I was unable to do so.

Q. Let us get back to my question. Then in substance your testimony is that in as much as the 1938 and 1939 entries have not turned brown and the questioned entry has not turned brown, you are not assuming to fix the date of the entry of this questioned entry by many years as compared to exact date, isn't that so?

A. That is substantially true.

Mr. Fowler: Now, your Honor please, to further demonstrate the impossibility of fixing that, may I have the privilege of submitting to this witness specimens from this same book with the dates covered, specimens that resemble in appearance and in color—

Mr. Werner: I object to that.

Mr. Fowler: I have not finished.

The Court: Well, if the witness wants to examine them he may do so, but he does not need to.

Mr. Fowler: May I have the privilege of showing them to him and asking him if he will give his opinion?

[fol. 182] The Court: If the witness does not care to do it he need not.

Mr. Fowler: May we suspend now and I can prepare such specimens with the dates covered to show to him at the afternoon session?

Mr. Werner: Mr. Fowler says he has some specimens. If he will show them to the witness we can save time and get along.

Mr. Fowler: I don't think we are in so much of a hurry that we can not do that.

The Court: Are you willing to take the conditions he imposes and examine any entries on the books?

The Witness: Yes. In order to make and pass any judgment about it at all I would have to test it to see whether it is the same kind of ink, and I have not tested all the other entries in the book. Some of the other entries I have examined already, and there are other entries in the book not made with iron ink, and those entries are in other colors besides brown.

Mr. Fowler: This witness has told us it is a simple chemical test. He just touches them with potassium something-or-other.

The Court: I think if you have an expert that you want to put on later you may do so.

Mr. Fowler: I am content to take Mr. Appel as my expert if he will do it.

The Court: Would you have to make a chemical analysis?

The Witness: If I have already seen it I might testify right now. Otherwise I might have to go through some series of tests.

The Court: That obviously can not be done in a half hour. Let us get along with the trial.

Mr. Fowler: May I submit the specimens to him at 2 o'clock this afternoon and let him take his time to it. I will reduce it to three or four.

[fol. 183] Mr. Werner: If Mr. Fowler will show them to the witness now which he has, the witness may have already examined them. That is what I am trying to get Mr. Fowler to do.

Q. Have you a record of the specimens you examined in the book?

A. Not all of them.

Q. Have you a record of part of them?

A. Yes.

Q. Will you let me have them to help me out in preparing some more?

Mr. Werner: Here we go again.

Mr. Fowler: Your Honor, I could never have told how this cross examination would go along until it got into these channels.

The Court: Let us call the next witness. Perhaps counsel can agree upon this.

Mr. Fowler: Your Honor is reserving decision on the objection?

The Witness: If I have not already tested the kind of ink, I wouldn't undertake to do it here. I would have to have the opportunity to make a proper test in the laboratory.

Mr. Werner: If Mr. Fowler will show the witness the entries now, we may go on.

Mr. Fowler: If you will give me the list of the entries you have examined. I have asked for them.

The Court: Let's get along and call the next witness.

Redirect examination.

By Mr. Werner:

Q. Mr. Appel—

The Court: Are you going to open this all up again?
[fol. 184] Mr. Werner: No, sir. I just want to ask one question.

Q. Are you equipped to make the test you have mentioned here?

A. No, I am not.

Recross-examination.

By Mr. Fowler:

Q. There are no facilities in this building for testing the chemical contents of ink?

A. None that I know of.

Q. None in the building?

A. Not that I know of.

Q. None for testing the comparative age of inks—you haven't one of these binocular microscopes?

A. No, sir.

Q. If we could furnish one of those would that be all right?

A. No, sir.

Q. That wouldn't be enough?

A. No, sir.

The Court: All right, go ahead.

Mr. Werner: We would like to make a stipulation with the consent of Mr. Fowler in reference to the witness J. C. Lowry, the identifying witness on Exhibit 1. He was served with a subpoena, and the doctors have submitted a certificate stating that he is too ill to come to court and will be too ill for quite a while to testify.

Mr. Werner: The government rests.

(Conference at the bench.)

(Recess until 2:30 P. M.)

Afternoon Session 2.30 P. M.

The Court: Gentlemen of the jury, counsel have asked me for a considerable amount of time to enable them to

argue a motion which they may make. I think I will not [fol. 185] keep you this afternoon, but allow you to go until tomorrow morning at half past ten.

In connection with one of the jurors having received a communication, let me say that if any of you have or shall receive communications through the mail or otherwise in any shape or form, disregard them entirely, proceed upon the evidence that may be adduced in this court room. Fairness to the defendant and to the government demands that.

I was very glad to receive a communication that came to one of your number. Now, if you have spoken about it among yourselves, disregard it entirely, and disregard any newspaper comments you may see about the case or any comment about it through the radio, until the issue is decided by you by your verdict, and that verdict should be a conscientious verdict.

Mr. Fowler: While the jury is still here, your Honor, in relation to the examination of that last witness, may I state that at the start of the recess I asked the district attorney for Government's Exhibit 9 for the purpose of selecting certain entries covering dates and submitting them in accordance with the offer I had made before that in open court, when my request was first denied; and second, the book was offered to me, but Mr. Werner of the district attorney's office stood at my elbow. I asked him if it was his purpose to watch me selecting the names, dates and the entries, and he said yes. When he said that I returned him the book.

Mr. Werner: The circumstances, your Honor, as I recall them, Mr. Fowler was afforded an opportunity to inspect the book. He said he didn't wish to examine it in our presence. I said we would insist on it, that a government officer be present at all times in the future when Mr. [fol. 186] Fowler examined any exhibits which were in evidence.

Mr. Fowler: I asked him if he was going to be present and he said yes.

At this time may I renew the motions that I made in chambers. I don't want to repeat them here.

May I renew the motion first to examine the other jurors.

The Court: Denied.

Mr. Fowler: Exception.

May I renew the motion for a mistrial?

The Court: Denied.

Mr. Fowler: Exception.

I renew the motion to withdraw juror No. 1 and substitute one of the alternates on the grounds already known to the Court.

The Court: Motion denied.

Mr. Fowler: Exception.

The Court: All right, ladies and gentlemen of the jury, you may return tomorrow morning at half past ten.

(The jury retired from the court room.)

MOTION FOR DIRECTED VERDICT, ETC.

Mr. Aronow: On behalf of the defendant I move for a directed verdict of acquittal, or in the alternative for a dismissal of the government's case, on the ground that the government has failed to make out a case against this defendant.

The statute involved, if your Honor please, under which this defendant has been indicted, is Section 220 of Title 22 of the United States Code. This section is divided into two parts. One part is independent of the other. This defendant has been indicted under the second part of the [fol. 187] section. That part of the section reads as follows: "or whoever shall wilfully and knowingly use or attempt to use or furnish to another for use any passport, the issue of which was secured in any way by reason of any false statement."

It is our contention that the government has failed to prove as a matter of fact that that passport was used on September 30, 1937, as alleged in the indictment.

The indictment describes the use; that part of the indictment which describes the use reads as follows: "the defendant herein did use and present to an Inspector of the United States Immigration and Naturalization Service at the Port and City of New York within the Southern District of New York, within the jurisdiction of this Court on or about the 30th day of September, 1937, to gain and secure entry and admission into the United States"; it being understood it was a passport they were talking about.

Now then, all the proof in the record that deals with the presentation of that passport is to be found in nine

pages of the stenographic record, or at least those pages of the testimony of Inspector Faire.

Inspector Faire testified that he had no independent recollection of the defendant having presented to him a passport on September 30, 1937. Hence, in the absence of any independent recollection the government can only make its case on circumstantial evidence. So they bring a manifest, which is prepared by a purser, as testified to in those nine pages, and the manifest indicates that a person by the name of the defendant was admitted to the United States on that day, and alongside of the name of this defendant there is a passport number, which corresponds with the [fol. 188] passport number on the application for the passport. That is Government's Exhibit 1. But in the absence of any independent recollection on the part of this witness Fair, who is the only one who could have had any transaction of whatsoever nature with this defendant on the 30th day of September, the government can only rely on circumstantial evidence. Hence, we must see whether or not all the circumstances point in that direction.

At the outset I would like to quote from 57 Federal Reporter, Second Series, page 816 at page 822, a typical quotation concerning the law of circumstantial evidence, which is to be found in the United States Supreme Court decisions as well as the decisions of all the various circuits throughout the country. The law is identical, and I am quoting this as typical of the law of circumstantial evidence. This quotation reads as follows:

"The evidence is circumstantial. In order to sustain a conviction on circumstantial evidence, all the circumstances proved must be consistent with each other, consistent with the hypothesis that the accused is guilty, and at the same time inconsistent with the hypothesis that he is innocent."

Such appears to be the general rule of law applicable to circumstantial evidence.

Then in that particular case, as will be found in this case when I go into the facts, there are only two hypothesis. I am quoting further.

"And deducible from the evidence, either the defendants were the owners or otherwise financially interested in the liquor or they were men hired by the men higher up to guard the same."

[fol. 189] In this particular case I am quoting from, it seems that a truckload of liquor was being followed by government men and an automobile containing these defendants had gotten in the way of the government men and the truckload of liquor, and when the government men attempted to seize the liquor, guns were drawn by the men in this automobile, and there was quite a shooting match. But the court said it was consistent with innocence, if they were not the owners of the liquor, because they might possibly be hired to guard the truck and still not have owned the truck.

Now, how does that apply to the instant case? I have outlined here all the theories of the government as well as the theory of the defense, and we run into two conflicting hypotheses.

Insofar as the defense here is concerned we have this situation. Faire testified that a manifest, Government's Exhibit 6, was prepared by the purser aboard the boat; that on September 30, 1937, that is the day of the alleged crime, and that is the only day we are concerned with, because if nothing happened on that day, so far as the passport transaction is concerned, then we are not concerned with the statements which the defendant could have made,—they become academic; Faire testified that on that day he boarded the boat and there found a manifest which was already prepared by the purser and that manifest already contained a passport number.

Now then, he is asked: "Did you check that passport?" As a matter of fact, your Honor asked him that question quite lengthily. The witness testified that the entire page of the manifest contained checkmarks and that all the checkmarks indicated that the persons that were listed on [fol. 190] that sheet, who were all American citizens, had been allowed to land.

We have this witness stating, "The whole manifest if of American citizens."

"The Court: And when the man presented his passport what did you do?"

"The Witness: That check mark shows he was admitted as a United States citizen.

"The Court: On a passport?"

"The Witness: Not necessarily."

Then we have a circumstantial case. It was either necessarily or not necessarily. But there again I do not seek to rely on one quotation in the case, or in those nine pages I refer to, because all of those nine pages are replete with quotations of that kind.

At page 81—I will follow chronologically through the nine pages—at page 81 Faire testified:

“A. The manifest indicates he was an American citizen and was admitted to the United States as an American citizen.”

That is all he said, that the manifest indicates. He does not say anything about a passport.

“Q. Now, from looking at the manifest, Mr. Faire, can you state whether or not you examined all of the individuals on that sheet? A. Yes, sir, I can. Check marks appear on all the names on the sheet.”

Now I will jump to page 88 for a moment, because he defines the meaning of checkmarks there.

“The Witness: That check mark shows he was admitted as a United States citizen.”

[fol. 191] And there I am repeating myself. This followed immediately:

“The Court: On a passport?

“The Witness: Not necessarily.”

Mr. Werner: Read the next sentence.

Mr. Aronow: “The Court: Can you tell us whether he had a passport?

“The Witness: From the fact the number of the passport appears there.”

Now then, that is still consistent with our hypothesis. We do not disclaim the fact that he did not have a passport. That is the hypothesis of the government. Having had a passport, and presumably having had one when he boarded the boat, he may have told the purser of the boat the number of the passport, or even shown the purser on the boat the passport, from the fact that the number is listed on the manifest.

That is not the crime charged, but rather what he did with the government inspector. So, as Mr. Werner asked me, Will you read the next question? I will do so.

"The Court: Can you tell us whether he had a passport?"

That is consistent with the hypothesis of innocence. He may have had a passport and not used it.

Mr. Werner: Go to page 82.

Mr. Aronow: Page 82 of the stenographic record:

"Q. Do you have any independent recollection of the arrival of this particular individual Robert Wiener? A. No, I don't."

Page 83:

[fol. 192] "Q. Were credentials presented in this particular case by the passenger?"

Here you will notice the question under direct examination by the government was "credentials", because Faire had testified in the immediately preceding question: "They present their credentials and a landing card.", proving again the consistency and theory that a passport was not necessarily presented, and he used the term "credentials."

"Q. What did you do? A. I presumably stamped the landing card and admitted the passenger as a citizen of the United States."

Now I jump to page 85:

"Q. Then that page, Government's Exhibit 6, was your special job that morning? A. This particular manifest right here, yes, sir.", which means we are concerned only with this transaction between Faire, alleged transaction between Faire and the defendant.

A question further down the page:

"Q. Now, need an American citizen have a passport to get by you coming in?"

"Mr. Dunigan: That is objected to as a question of law.

"The Court: He may answer.

"Q. Need he? A. No, he does not.

"Q. He can use anything that satisfies you to identify himself as an American citizen? A. That is correct."

So evidently the conclusion to be drawn from that fact is not the compulsion as to the use of a passport, but anything that can be used for identification.

[fol. 193] Page 86: "Q. Just that minute when you are satisfied he is a citizen your jurisdiction ends? A. That is correct.

"Q. And he has the right to enter, passport or no passport?"

There you have two hypotheses again.

"A. After he has satisfied me he is a citizen of the United States.

"Q. For instance, if he came up a line and said, 'I have lost my passport, but here is my birth certificate,' it is O. K.? A. A birth certificate would not necessarily prove the citizenship, no."

So evidently the witness hedged a little.

We follow down a few questions and we find:

"Q. If it proved an American birth, wouldn't you be satisfied? A. If the certificate was absolutely in order, I think I would be satisfied.

"Q. Any proof that would satisfy you of his American birth would pass him into the country as an American citizen? A. That is right.

"Q. It wouldn't have to be a passport? A. No."

Then we get to a very significant question here. It seems that this witness was refreshing his recollection on a general custom, which was not all-inclusive, but in scrutinizing his testimony carefully, and we make it all-inclusive, it does include birth certificate or any other means of identification. But there was no entry in that manifest to show what this defendant, who is alleged to have presented a passport on that morning, did or did not present for the purpose of identification, because the question is put:

"Q. Did you make any writing on the list of names as to what the people showed you yourself? the people being all of those on that manifest. A. No, I didn't."

[fol. 194]—And then he was asked again about Exhibit 6, that typewritten sheet, the Normandie manifest:

“Q. That typewritten sheet, which is Government’s Exhibit 6, was already prepared when you got on board the ship, was it? A. That is correct.

“Q. Do you know by whom? A. The purser on board the vessel.

“Q. Do you know when? A. No, I do not.

“Q. Do you know from what data he prepared it? A. Well, I can not answer—,” which again indicates that it is highly possible that the defendant, if he did have a passport, could have told the purser about the number. But there again it is not important one way or the other.

The Court: Well, he uses a number and tells the purser that passport number.

Mr. Aronow: Would your Honor say that was a use of the passport or the presentation to the immigration inspector, as the indictment charges?

The Court: I don’t suppose it makes any difference what the means are so long as that passport facilitates his identification and lets him into the country.

Mr. Aronow: That is not the case. They plead the use in the language of the indictment. I might go along with your Honor, though I do not make that concession, but they went further and virtually gave us a bill of particulars in the indictment, and they are bound by that, because they say that he used and presented to an inspector of the Immigration Service at the Port of New York, so no matter what he did—

The Court: I think you would fall within it. As I understand, coming across he makes the presentation of his passport to somebody on the ship and then the purser, knowing [fol. 195] that as being the credentials which admit this man as an American citizen to this country, is satisfied, and when they land here the manifest is turned over and checked over and the passenger has to come along and identify himself as being the person shown on the manifest, and then he gets a landing card.

When you present this passport or give its number you are making use of an instrumentality which was fraudulently obtained, according to the indictment.

Mr. Aronow: Would you say that he had presented it to an agent of the government? He has to do what the indictment charges.

The Court: It charges that the passport had been secured by false means.

Mr. Aronow: If your Honor will turn to the second page of the indictment, the language is "the defendant herein did use and present to an Inspector of the United States Immigration and Naturalization Service." What he may have presented to a purser on the ship would not be presenting to an inspector, an official of the government.

The Court: What I understand was that this man was required to exhibit the passport, or did exhibit the passport, bearing the number and when the officer saw it he checked it and thereupon he was given a landing card.

Mr. Aronow: If that was all the testimony I would agree, but I disagree because he extended that custom beyond the passport means of identification. He said he could come in with any means of identification.

The Court: He had a passport, didn't he? In the absence of proof that he presented something else, it is reasonable to presume that he presented a passport, isn't it?

[fol. 196] Mr. Aronow: I do not think this is for the jury to speculate over. If you have a conflict of testimony, the government against the defense, then the jury might balance the probability.

The Court: I will deny the motion.

Mr. Aronow: An exception, sir.

Now I have another motion, based upon the law. Section 220 of Title 22 of the United States Code, under which the defendant is indicted, was the Act of 1917, and we must go back to the legislative history of that section to find out just what the legislature intended when they employed the word "use" in Section 220.

That section was a part of a whole series aimed at neutrality and espionage abroad. It seems there was great danger at that time that people might go abroad and act in a way which might embroil us in unpleasant incidents or might be to the displeasure of this country. So it was for that purpose that Section 220 as we read the legislative history of that section was enacted, so that persons who would be using passports intended to be used abroad would not be using them as a result of false statements in obtaining the passports. They might say they were going abroad on pleasure when it was espionage. That is the reason for the section.

We must look to the definition of a passport before we

can have a full apprehension of what is meant by a passport. And what is the definition of a passport?

"A passport"—and I am reading from 71 Fed. 274, In Re. Gee Hop—"is a document which, from its nature and object is addressed to foreign powers, purporting only to be a request that the bearer of it may pass safely and freely, and is to be considered rather in the nature of a political [fol. 197] document by which the bearer is recognized, in foreign countries, as an American citizen, and which, by usage and law of nations, is received as evidence of the fact."

I can give other definitions but they all run the same.

Mr. Gaillard Hunt, a United States Passport Clerk, in his Report, "The American Passport, Its History," states "It (the passport) is a document issued by the Secretary of State, or under his authority, by a diplomatic or consular officer of the United States, stating his citizenship, and requests for him free passage and all lawful aid and protection during his travels or sojourns in foreign lands."

So it is merely a document for use in foreign lands, and it has no recognized legal use in this country.

Then, under the circumstances, if it has no recognized legal use in this country, its presentation for purposes of identification is not an act or such conduct as was contemplated by Congress when they enacted Section 220.

The Court: Might it not be used against the United States and is it not in its discretion?

Mr. Aronow: In the first part of Section 220 they say that any person making any false statement in an application for a passport shall be guilty of a crime. So they contemplated that situation. Moreover, there are other sections that would take care of that. If a man made a false application he might be prosecuted for perjury.

The Court: Isn't it common knowledge that passports are frequently used as a means of identification? Take in voting: are not passports frequently used with election officers?

[fol. 198] Mr. Aronow: Assuming, your Honor, that an American citizen or anybody illegally obtained a passport and he used it for the purpose of identifying himself as to voting, would your Honor then say that was a use within the contemplation of Section 220?

The Court: I am not prepared to say whether I would

or not. I am asking the question whether they are not frequently used for identification.

Mr. Aronow: It could be, but what is Congress's intention?

The Court: It seems to me the use by an alien of a fraudulently obtained passport for the purpose of identifying himself in that way as a citizen would fall within the statute. If I obtain a passport illegally and go out of the country and have no right to come in without the compliance with certain other provisions of law, and I come to an officer and I say, "Here is my passport," it seems to me that is a use of that passport which would be contrary to the law.

Mr. Aronow: The legislature has taken care of such conduct, but it is not for the judiciary to take care of that part of it.

The Court: Irrespective of what somebody might have said in debate in Congress, if a man obtained a passport fraudulently and used it to deceive, it seems to me it would fall within the statute.

Mr. Aronow: That is not our view, your Honor, and I take an exception.

We now move to strike from the record, or in the alternative to withhold from submission to the jury or to direct the jury to find in accordance with my motion, as I am about to deliver it, all testimony, evidence and exhibits dealing with the alleged false statement No. 1 as was contained in the indictment, namely, that the defendant falsely [fol. 199] stated that his name was Robert William Wiener, upon the ground that even the prosecution's evidence shows that for a long period of time, at least from 1917, when the defendant filled in the Draft Act statement, government exhibit 21, the defendant was known as William Wiener. This evidence shows that the defendant did not choose the name of Robert William Wiener in 1936 when he applied for the passport for the purpose of committing a fraud upon the government.

The Court: The motion is denied.

Mr. Aronow: An exception.

I also base that motion on all the testimony in the record as attested by the government's witnesses to the effect that he had been known as Wiener for a long time prior to 1936, when he applied for the passport.

The Court: That is also denied.

Mr. Aronow: An exception.

I make a similar motion with respect to the statement No. 2 as it is alleged in the indictment that the defendant said he was a citizen of the United States, which the government in its indictment claims he was not, on the ground that all the evidence introduced by the government is in the nature of admissions, and admissions under the law mean nothing more than what the defendant believed from time to time when those admissions were made as to what he thought on each of those occasions the facts were. The important thing is the failure to introduce independent corroborative proof. There is a complete failure of corpus proof on this subject. I think it falls within the case of *Duncan v. The United States*, 68 Fed. (2d) 136.

The Court: Have you looked at *Dacia v. The United States*?

[fol. 200] Mr. Werner: Here is the *Duncan* case. We will rely on that too.

Mr. Aronow: I direct your Honor's attention to the citizenship count of the decision, and not the other counts.

(The Court examines volume.)

The Court: I think that motion should be denied even on the *Duncan* case.

Mr. Aronow: Is your Honor referring to points 13 and 14 in the *Duncan* case which read as follows:

"With reference to the second count, the charge is that the appellant falsely represented himself to be a citizen of the United States without having been duly admitted to citizenship, etc., in violation of the statute."?

The Court: No, on 10 and 11.

Mr. Aronow: 10 and 11 deal with the birthplace in Camden, New Jersey. But we have different distinct false statements, and in order to find the false statement as to citizenship, you can not link that with other false statements alleged in the indictment.

The Court: The motion is denied.

Mr. Aronow: My motion to strike is predicated upon the fact there is a failure of corpus proof, and the admissions therefore are not sufficient to let this issue go to the jury.

The Court: Denied.

Mr. Aronow: An exception.

I make a similar motion with respect to the alleged third

false statement set forth in the indictment with reference to the birthplace of the defendant at Atlantic City on September 5, 1896, on the ground that the government has failed to introduce corpus proof of the offense; that all the [fol. 201] proof of the government is predicated upon admissions as to alienage, which standing alone are not sufficient to warrant the matter going to the jury.

The Court: The motion is denied.

Mr. Aronow: An exception.

I further move—a further ground of my motion that the government has failed to offer any evidence showing that the defendant was unreasonably relying upon on a duly certified birth certificate issued by the Department of Health of the State of New Jersey, certifying that he was born in Atlantic City on September 5, 1896, when he stated in his passport application that he was born in Atlantic City on that day.

The indictment pleads that the false statements were wilfully and knowingly made. It is the contention of the defense that he had a right to rely on the certificate, and if he did so he was not making a wilful, false statement.

The Court: That is a matter of defense.

Mr. Aronow: It may be, but it did come up in the trial.

The Court: I will hold that it was a question of whether he was acting in good faith, that there is evidence on that question that he did not act in good faith, and that it is a question for the jury.

Mr. Aronow: Your Honor holds that it is a matter for the jury to determine?

The Court: Yes, it is for the jury to determine.

Mr. Aronow: My position is that you should rule on it, your Honor, as a matter of law.

The Court: I can not quite see that. I think there is evidence there to go to the jury.

Mr. Aronow: An exception.

[fol. 202] I further move with respect to the same issue that the government has failed to introduce any evidence in any way connecting the defendant with the alleged fraudulent entry, or that he had knowledge that the entry was fraudulent, on the birth records of Atlantic City, New Jersey, to the effect that a Robert William Wiener was born on September 5, 1896, in accordance with the evidence contained in the exhibit dealing therewith.

The Court: That will be denied also.

Mr. Aronow: An exception.

The Court: What proof is there in the record as to any credentials used by the defendant when he came in on the Haverford?

Mr. Werner: There is this testimony, your Honor: "Q. Can you state from looking at the manifest whether or not the passport of the individual Robert Wiener was presented to you? A. Yes, sir, I can.

"Q. On what do you base your statement? A. The number of the passport, No. 32207 is entered on the manifest"—

The Court: I remember that. What I say is did the defendant have any documentary means of identification when he came in on the Haverford?

Mr. Werner: There is no evidence of that in the record.

The Court: What was the year of his entry?

Mr. Werner: The 14th of March, 1914.

The Court: Nothing but his own declaration?

Mr. Werner: Nothing but his own declaration.

Mr. Aronow: In the absence of the corpus I make my motion.

The Court: All right.

Mr. Aronow: I see our friend Werner wants to reopen the circumstantial evidence question again.

[fol. 203] The Court: No, I don't think we will do that.

Mr. Aronow: The hypothesis of innocence should be resolved in favor of the defendant. If your Honor pleases, I will take an exception.

With respect to the fourth alleged false statement in the indictment that the defendant had not resided outside of the United States wherein in truth and in fact he did, as the indictment reads—may I have the application?—I move that this issue either go to the jury with an instruction for the defendant, or that it be withheld and not submitted, on the ground that the application, Government's Exhibit 1, does not contain a false statement with respect to residence, and this is why: The statement with respect to residence recites as follows: "That I came to the United States on or about blank; that I resided continuously in the United States from blank to blank at New York, N. Y." Now there is a further scrawl further down which I will discuss later.

If that were the only thing in the record, then on the theory of the case which I have here in the Federal Courts,

in the U. S. v. Herrig, 204 Fed., 124, the Court said, in discussing false entries, "The statute prohibits making false entries. Neither false reports or false verifications are within the statute. False entries in reports are untrue statements of items of account." It seems a bank comp-troller had omitted to set forth in an item that read as follows: "Notes and bills rediscounted, blank," and nothing was filled in when in truth and in fact a certain amount had been discounted. The Court says here, "Here the entry as set out in the indictment is true and not false, though it fails to set out the amount of the notes and bills rediscounted. To convert it into a false entry it must be implied the negative "none" is intended to follow. If it were a [fol. 204] necessary implication, doubtless it would be indulged. But it is not. An implied affirmative is as reasonable—more reasonable, in view of the presumption of innocence."

Now then, we have here a blank which recites "I have resided continuously in the United States from blank to blank." The defendant having the presumption of innocence, it should be presumed that he had filled that in correctly.

The Court: I think he should have filled it in.

Mr. Aronow: Can we predicate a false statement on an omission?

The Court: I think so.

Mr. Aronow: Then we have a "none" in a scrawl which I believe is conceded to be illegible, concededly made in the handwriting of Earle, the government agent. Earle says he has no independent recollection of it other than a custom. He says the custom was to go over the blanks. Immediately that custom is impeached, when we have blanks he did not fill in. Then he says it would be the custom to have a conversation with the applicant and ask about the information. But, he has no independent recollection; and then he refers to the fact that there is a scrawl here in his handwriting, that the defendant told him the equivalent of "none," where it is an inference he is drawing from an impeached custom. It is just as logical that Earle might have inferred "none." In other words, the blank—"I have resided continuously in the United States from blank to blank" being just as susceptible, it is just as logical to conclude that Earle relied on that omission to draw the conclusion as to the "none." So we have a reasonable hypothesis of inno-

cence which should be indulged in by the Court. It is for this reason false statement 4 is not a false statement. [fol. 205] The Court: The motion is denied.

Mr. Aronow: An exception.

In this connection I make the same motion, that there is a failure of corpus proof and admissions standing on their own here are not sufficient to let the matter go to the jury.

The Court: The motion is denied.

Mr. Aronow: Exception.

(Adjourned to February 15, 1940, at 10.30 A. M.)

New York, February 15, 1940.

10.45 A. M.

Trial Resumed

(The following proceedings were had not within the presence of the jury.)

Mr. Aronow: I move to strike out Government's Exhibit 6, that is the Normandie manifest, on the following grounds:

1. There is no evidence in the record which justifies the conclusion that the information which appears on Exhibit 6 was given by the defendant to the purser. In this connection the Court's attention is called to the testimony of Immigration Inspector Faire on page 87 of the stenographic record where he is questioned concerning the manifest.

"Q. Do you know from what data he"—the purser—prepared it?"—the manifest. The words "purser" and "manifest" are my own. "A. Well, I cannot answer."

My further ground is that there is no evidence in the record to support the contention of the government that the [fol. 206] defendant at the time he is alleged to have entered the Port of New York on September 30, 1937, had a passport in his possession.

I now move to strike all of the testimony of Immigration Inspector Faire from the record on the ground that his testimony is so conflicting as to vitiate all such testimony given on direct examination and any repetition thereof that may have been given either on cross-examination or on inquiry by the Court, on the ground that its highly conflicting nature

impeaches all of its value and it would, therefore, be improper for submission to the jury, as its effect would be highly speculative.

The Court: The motion is denied.

Mr. Aronow: I take it that both motions to strike are denied?

The Court: Yes.

Mr. Aronow: And I respectfully except.

MOTION TO DISMISS, ETC.

I move to dismiss the indictment, or in the alternative for a directed verdict of acquittal, on the ground that the alleged crime, namely, the alleged use of the passport on September 30, 1937, has not been proven. At best, the alleged presentation of the passport on this day is based upon an inference that the defendant had a passport in his possession which, in turn, is based on an inference which is presumed from the fact that a number appears on the manifest, Government's Exhibit 6, which corresponds with the number on the application for a passport which is Government's Exhibit 1 in evidence.

The number appearing on the manifest is presumed to have been obtained from the passport, which is presumed to have been in the possession of the defendant, which presumption is inferred from the fact that the number on the application, Government's Exhibit 1, corresponds with the number on the manifest, Government's Exhibit 6. This is clearly in violation of the rule which is fundamental and [fol. 207] which can tersely be stated in the language of the Supreme Court in the case of United States v. Ross, 92 U. S., at page 283, as follows:

"It is obvious that this presumption could have been made only by piling inference upon inference, and presumption upon presumption."

The Court: The motion is denied.

Mr. Aronow: I respectfully except.

(The jury entered the courtroom at this point and the proceedings were resumed within the presence of the jury):

Mr. Fowler: If your Honor please, the defendant rests. And at this time I renew all of the motions to dismiss as made at the end of the government's case and on the same ground as there urged.

The Court: The motions are denied.

Mr. Fowler: An exception.

In the matter of the three motions which were made in chambers, the motion for the substitution of Juror No. 1 by one of the alternates which, which were based on the receipt of Government's Exhibit 38, and the motion for a mistrial, I renew my motion on the specific ground that from the contents of Government's Exhibit 38, I urge that it is humanly impossible for this jury now to accord this defendant an impartial jury trial which is his right under the law. We know that at least one of the jurors knows the contents of this exhibit, and we are unable to tell how many of the other jurors may know of it.

The Court: The motion is denied.

Mr. Fowler: An exception.

Mr. Werner: The government rests.

Mr. Fowler: May I proceed to sum up?

The Court: Yes.

(Mr. Fowler summed up in behalf of the defendant.)

(Mr. Dunigan summed up in behalf of the Government.)

[fol. 208]

REQUESTS TO CHARGE

The following are the requests to charge on behalf of the defendant.

1. The defendant is presumed to be innocent until the contrary is established beyond a reasonable doubt. (Covered.)

2. The presumption of innocence is not a mere formality. Every juror is bound to entertain it conscientiously, sincerely and without any mental reservation or evasion whatsoever, and to give to the defendant the full benefit of it. (Covered.)

3. In deciding the question of reasonable doubt, which each juror must decide for himself, he must not allow his previous opinions or impressions to affect, impair or destroy a doubt which otherwise he would entertain upon the evidence. Each juror must dispel any impression or preconceived notion which he may have derived from the reading of newspapers. (Covered.)

4. Before you can find the defendant guilty, the facts proved must not only all be consistent with the theory of

the defendant's guilt, but they must each and every one be absolutely inconsistent with the theory of innocence; otherwise, you must acquit. (Covered.)

5. The denial of the motion to dismiss the indictment made by the defendant's counsel at the close of the Government's case, and the denial of the motion made by the defendant's counsel at the close of the entire case, are not to be taken by the jury as an indication of the guilt of the defendant. (Covered.)

6. The jury, in determining the guilt or innocence of the defendant can consider only the evidence of the case and are to disregard any statement made during the course of [fol. 209] the trial by counsel and the Court not supported by evidence, and they are not to be influenced or governed by any expression of opinion or action of either Court or counsel. (Covered.)

7. The jury, in considering this case after its submission to them, must proceed upon the presumption that the accused is innocent of the crime charged in the indictment, and that it is necessary for the Government to rebut this presumption by the evidence which convinces them beyond a reasonable doubt that the defendant is guilty of the crime charged. (Covered.)

8. The burden of proof in this case rests with the Government from the beginning to the end of the trial to establish beyond a reasonable doubt every fact essential to the conviction of the defendant, and if the Government has failed to prove such beyond a reasonable doubt, the defendant must be acquitted. (Covered.)

9. The fact that the Court has denied motions made from time to time by defendant's counsel on behalf of the defendant, and the rulings of the Court upon objections, and the refusal of the Court to charge as requested, are not to be taken as any expression of opinion on the part of the Court upon the facts of this case, but must be regarded only as rulings upon the law concerning which the jury has no interest. (Covered.)

10. In weighing the testimony and arriving at the verdict, the jury must not be influenced by questions of public interest or public policy, newspaper articles, radio comment, the effect of their verdict upon other persons charged with

crime, whether the verdict would or would not be pleasing to the judge, or any other consideration outside of the evidence in this case. (Covered.)

[fol. 210] 11. If the evidence against the defendant is equally consistent with innocence and guilt, the jury must adopt the construction in favor of innocence, and must acquit. (Covered.)

12. The failure of the defendant to take the witness stand to testify in his own behalf does not create any presumption against him; the jury is charged that it must not permit that fact to weigh in the slightest degree against the defendant, nor should this fact enter into the discussion or deliberations of the jury in any manner. (Covered.)

13. The fact that the defendant on trial has been indicted is not to be taken in the slightest degree as indicating his guilt. Consequently, the jury must not give any weight whatsoever to the fact that an indictment has been returned against him. To no extent whatever does any charge in the indictment prove the fact of which it speaks or the guilt of the defendant on trial, and the jury must ignore it entirely as effective for such purpose. It does not even create nor should the jury permit it to create a suspicion of guilt. (Covered.)

14. The presumption of innocence survives the filing of an indictment, arrest, arraignment and the empanelling of a jury for the trial of the issues. It continues during the introduction of evidence upon the trial, the summing up of counsel, and the charge of the Court. (Covered.)

15. It is not necessary for this defendant to prove his innocence, but the burden of proof rests upon the prosecution to establish every element of the offense with which he is charged, and every element of such offense must be proved to a moral certainty and beyond all reasonable doubt. If the prosecution fails to establish to a moral certainty and beyond all reasonable doubt any one element of the offense with which the defendant is charged, and which it [fol. 211] is necessary to establish in order to convict, or if there remains in the minds of the jurors a reasonable doubt as to whether or not the prosecution has established any one of such elements, constituting the offense, to a moral certainty and beyond all reasonable doubt, then you must find

the defendant not guilty. This applies to the jury as a whole and to each individual juror. (Covered.)

16. Reasonable doubt is doubt based upon reasons which is reasonable in view of all the evidence. To overcome such reasonable doubt requires such proof as satisfies the judgment and conscience of the jurors and each of them that the offense charged has been committed by the defendant and as to leave no other reasonable conclusion possible. Otherwise, the jury must acquit. (Covered.)

17. Mere probabilities or suspicions are not sufficient to warrant a conviction nor is it sufficient that the greater weight or preponderance of the evidence supports the allegations of an indictment, nor is it sufficient that upon the doctrine of chances it is more probable that the defendant is guilty than innocent. The jury are not concerned with probabilities, but only with evidence. (Covered.)

18. That the actions of the Court during this trial in passing upon motions made by the defendant, or in overruling objections made by him, or of sustaining objections made by counsel for the Government, are not to be taken as an indication of the guilt or innocence of the defendant. Counsel for the defendant not only have the right, but are charged with the duty of objecting to the introduction in evidence of any statement or exhibit offered by the Government which such counsel for the defendant believes, under the rules of evidence, should not be admitted. The jury must understand that the Court has no opinions and expresses no opinion as to the guilt or innocence of the defendant. (Covered.)

[fol. 212] 19. While it is desirable that the jurors agree upon a verdict after a full and fair discussion, nevertheless, it is the duty of each and every member of the jury to decide the issues presented for himself or herself, and if, after a careful consideration of the evidence in the case and the instructions of the Court and a free consultation with his fellows, there is in any juror's mind a reasonable doubt as to the defendant's guilt, it is his or her duty, under his or her oath, to stand by this opinion. No juror should yield his or her view simply because all the other jurors may disagree with him or her. (Declined as framed.)

20. A United States passport is a document which has no sanctioned use in the Port of New York. It is a docu-

ment solely for use in foreign countries. Although it may be used to identify the bearer in the Port of New York, such use is not the kind of use that was contemplated by Congress when it enacted the section under which this defendant is indicted. (Declined.)

21. There is no direct evidence in the case that the defendant used and presented a passport to an Inspector of Immigration and Naturalization, as charged in the indictment, in the Port of New York on September 30, 1937. (Declined.)

22. The offense charged against this defendant is the use and presentation of Passport No. 332207 to an Inspector of Immigration and Naturalization, as charged in the indictment, in the Port of New York on September 30, 1937. This is the gravamen of the charge against the defendant. (Covered.)

23. You are not to concern yourselves with the probability or possibility that the defendant may have used the passport abroad. If this is all that you find with respect to the [fol. 213] alleged use of the passport by the defendant, then it is your duty to acquit. (Covered.)

24. The prosecution is relying upon circumstantial evidence to prove that this defendant used and presented the passport on September 30, 1937 in the Port of New York to an Inspector of Immigration and Naturalization. In this connection, I charge you as to the law of circumstantial evidence as follows:

“* * * In order to sustain a conviction on circumstantial evidence, all of the circumstances proved must be consistent with each other, consistent with the hypothesis that the accused is guilty, and at the same time is inconsistent with the hypothesis that he is innocent.” (See *Rivera v. United States*, 57 F. (2d) 816, 822.)

(Covered.)

25. If you find that the defendant did present any means of identification as an American citizen other than the passport alleged herein, then it is your duty to acquit. (Covered.)

26. You are not permitted to infer that by reason of the fact that there appears Passport No. 332207 on the SS Nor-

mandie manifest, which number corresponds with the number which appears on the application for a passport, the defendant used a passport when entering the Port of New York on September 30, 1937, as alleged in the indictment. In other words, you have no right to draw an inference from an inference. (Declined.)

27. If you find that the only manner in which you can assume that this defendant presented a passport to the Inspector for Immigration and Naturalization would be based on an inference derived from a further inference that this defendant showed a passport to the pursuer of the SS Normandie, then it is your duty to acquit. (Declined as framed.)

[fol. 214] 28. The mere fact that the number appearing on the passport application corresponds with the number appearing on the steamship manifest is no proof that the defendant used the passport in entering the Port of New York on September 30, 1937 for the reason that the law does not permit presumptions to be drawn upon presumptions. (Declined as framed.)

29. Even if you find that any or all of the four alleged statements as charged in the indictment with respect to the defendant's name, birthplace, citizenship, and the residence abroad were false, you must, nevertheless, acquit this defendant unless you find to the exclusion of any other possibility that the defendant presented a passport No. 332207 to the Inspector of Immigration and Naturalization in the Port of New York on September 30, 1937, as charged in the indictment. (Covered.)

30. If you find that the defendant used the name, Robert William Wiener, or a variation thereof, such as William Wiener, for many years prior to 1936, when he made an application for Passport No. 332207, then you must disregard the charge in the indictment that he falsely stated that his name was Robert William Wiener. In this regard, I charge you that under the law a man may change his name at will so long as he does not do so for a fraudulent purpose. I also direct your attention to the fact that the prosecution's own evidence shows that the defendant used the name William Wiener as far back as 1917, and that the prosecution's witness, Max Bedacht, testified that he always knew the defendant as William Wiener and that he knew him from 12 to 15 years. (Declined as framed.)

31. If you find that the defendant relied upon a birth certificate certified to by the Registrar of Vital Statistics of the Department of Health of Atlantic City, N. J., then you [fol. 215] must disregard the charge in the indictment that he falsely stated that he was born in Atlantic City, N. J. on September 5th, 1896. (Covered.)

32. If you find that the defendant relied upon a birth certificate certified to by the Registrar of Vital Statistics of the Department of Health of Atlantic City, N. J., then you must disregard the charge in the indictment that he falsely stated that he was a citizen of the United States. (Covered.)

33. The witness Earle testified that he himself made the inscription upon the application for the passport, which inscription the witness Earle interpreted as the word "none". He testified further that he had no independent recollection concerning a conversation with the defendant with respect to this answer. He bases his reason for the inscription upon a custom of questioning applicants concerning blank spaces in their applications. Such proof is purely circumstantial. Under the circumstances, therefore, you are permitted to assume that the witness Earle inferred the answer "none" from the ambiguity of the preceding blanks concerning continuity of residence, rather than from the alleged conversation with the defendant. It is your duty to adopt the hypothesis of innocence and find that the defendant in no way is responsible for the appearance of this inscription "none". In any event, if you find that the inscription made by the witness Earle in the blank space dealing with residence abroad was not easily, clearly and immediately legible, then you must find that the defendant had no knowledge of the significance of such an inscription. In that event, you must find that there was no false statement made by the defendant concerning his residence abroad. (Declined.)

[fol. 216]

CHARGE OF THE COURT

The Court (Knox, J.): Madam Foreman and Gentlemen of the Jury: Essentially this is a very simple case. Simple in that there is no contradiction of much of the evidence, indeed, of any of the evidence that has been produced by the Government.

The point at issue between the Government and the de-

fendant is the interpretation to be placed on the evidence that has been offered here before you.

At the outset I want to state to you that the defendant is not to be convicted upon suspicion, surmise, or conjecture, but only, if he is to be convicted at all, upon evidence as produced at this trial.

As I explained to you at the outset, when you were selected as jurors, the defendant is to have at your hands every right, privilege and benefit that would be accorded to the most prominent man in the United States. He is to have that, and nothing more. He is not to be favored beyond the extent that the law allows him to be favored. And it is your duty as jurors, and in fairness, both the Government and to the defendant, to decide the case conscientiously, impartially and fairly upon the evidence that has been introduced from this witness box.

The charge against the defendant is that heretofore, on or about the 30th day of September, 1937, he unlawfully, wilfully, and knowingly, for the purpose of entering the United States, used and attempted to use a passport issued under the authority of the United States, the issuance of which he secured by reason of false statements which he made in the application therefor. That is to say, at the time and place aforesaid, the defendant did unlawfully, wilfully, and knowingly, use and attempt to use a passport No. 332207, issued on or about July 21, 1936, in the name of "Robert William Wiener," which said passport the defendant had obtained and secured by reason of false statements made in the application therefor, which said application was executed by him at a passport agency of the Department of State at New York City, New York, on or about July 18, 1936, in the name of "Robert William Wiener," in which said passport application, executed on or about July 18, 1936, as aforesaid, the defendant herein falsely stated in substance and effect: (1) that his name was Robert William Wiener; (2) that he was "a citizen of the United States"; and, (3) that he was born "at Atlantic City, N. J., U. S. A., on September 5, 1896"; and (4) that he had not resided outside the United States; whereas, in truth and in fact, as the defendant herein then and there well knew: (1) his name was not "Robert William Wiener"; (2) he was not a citizen of the United States; (3) he was not born at Atlantic City, N. J., U. S. A., on September 5, 1896; and, (4) he had resided outside the United States, which

said Passport No. 332207, issued on or about July 21, 1936, in the name of "Robert William Wiener," issued on the said application as aforesaid, the defendant herein did use and present to an inspector of the United States Immigration and Naturalization Service at the Port and City of New York within the Southern District of New York, within the jurisdiction of this Court, on or about the 30th day of November, 1937, to gain and secure entry and admission into the United States, against the peace of the United States and their dignity, and contrary to the form of the statute of the United States in such case made and provided.

It is not necessary for the Government to establish the falsity of each of those alleged allegations that are said to have been wrongfully inserted in the passport application. It will be sufficient if the Government establishes beyond a reasonable doubt that the defendant made one or more of the false statements charged against him and obtained the passport and, thereafter, when he came into the United States from his trip abroad the passport was presented to [fol. 218] the immigration inspector for the purpose of facilitating his entry into the United States.

This is a criminal prosecution, and as to each criminal prosecution in this country there are certain general principles of law, and they are, of course, applicable here.

One of them is that this indictment in and of itself means nothing so far as proof of the defendant's guilt is concerned. This is merely a charge which specifies and points out to the defendant the nature of the offense that is asserted against him and which limits, as it were, the evidence that can come into the case, and which will enable him to make such defense as he sees fit.

Furthermore, the defendant is clothed with the presumption of innocence, and that presumption is evidence to be used in his behalf until when in considering the evidence you are satisfied that the evidence overthrows that presumption, and that you are satisfied that the defendant is guilty beyond a reasonable doubt.

If the evidence is evenly balanced, the defendant should be acquitted.

You must be satisfied to a moral certainty of the defendant's guilt before you can convict him.

Now, a reasonable doubt is not one that is born of fancy; it is not one that you conjure up out of the air; it is not one that is born of caprice, nor is it one that arises from the

natural reluctance of a person to adjudge another man guilty of a crime. It is one which grows out of the evidence, or out of some lack of evidence, and which makes it impossible for you to say to yourselves, when you have fairly and impartially considered all the evidence that you believe in the case, for you to say that you have a moral certainty of the defendant's guilt.

If, after impartially considering all the evidence in the case, you do not have an abiding conviction of his guilt, you should acquit him. But, if after such consideration, you [fol. 219] are satisfied to an extent, which if you had that same degree of satisfaction in your own affairs in life you would act on it, then you have no reasonable doubt, and the defendant should be convicted.

It is not necessary for the Government to prove the defendant guilty beyond all possible doubt, because that is a standard that you could never hope to reach. And so, as I say again, if when you have gone over all the evidence with a fixed disposition to be fair to both sides, you reach a conclusion upon which if you had such a conclusion in the affairs of your own lives, you would act, you have no reasonable doubt, and you should convict. If you have such doubt, then you should acquit.

During the course of the trial you were allowed to go and come as you chose. Some of you may have read newspaper accounts, some of you may have listened to radio comments concerning this case; and one of your number received a communication through the mail. Lay all those things aside. They have absolutely no bearing upon this case, and they should not influence you in the slightest way, shape or form. You are to exclude from your consideration anything and everything that happened outside this courtroom and rely only upon the sworn testimony and the exhibits which were admitted in evidence in the case.

If you have any idea that I entertain an opinion as to what your verdict should be, do not let that influence you. So far as I know, I have shown nothing. I have done and said nothing that indicated what my view may be. But if any one of you have the slightest impression of what my opinion is, lay that aside, because you are the exclusive judges of the facts, and my opinion should not sway you in any way at all.

And if an impression has been formed by reason of the fact that I have denied certain motions made by the defend-

ant, or that I have ruled out certain evidence, or have sus-
[fol. 220] tained or failed to sustain objections made by
counsel, all that had to do with matters of law, and did not
touch the facts in the case.

The arguments of counsel are valid only so far as you
think they are valid, having in mind the evidence that is
presented to you. And if those arguments were invalid and
not logical, lay them aside, and get right down to the evi-
dence and consider that and make your decision upon it.

There has been in this case a good deal of what is known
as circumstantial evidence. Some people among laymen
have the idea that circumstantial evidence has certain weak-
nesses about it. That is wholly and entirely wrong, pro-
vided that circumstantial evidence is of the character which
the law demands. People sometimes say that if a man says
something, why that is direct evidence, and it is worth more
than circumstantial evidence. That is not necessarily so.

I might tell you that I came downtown a certain way this
morning. That would be direct evidence, if it were at all
important to some issue being passed upon by a jury. That
might be entirely false. I might say that I came down on
the East Side Subway, when as a matter of fact I came
down on the West Side Subway. But after I had made that
statement the person who was opposed to me might come
along and bring the proprietor of a newspaper stand at a
subway station uptown somewhere, say 116th Street and
Broadway. And that man would say, "Judge Knox bought
a paper there from me this morning and I gave him some
change, and he asked for a nickel so that he could deposit
it in the turnstile." He lost sight of me then. He was busy
selling papers to someone else. Thereafter, somebody else
comes along and says, "Well, I saw Judge Knox on the
station platform downstairs where the trains come along."
Then he lost sight of me. And then somebody comes along
[fol. 221] and says, "I picked up a briefcase that was left on
the train this morning and that was a briefcase that had on
it the initials of Judge Knox." And somebody else will
come along and say, "Well, I have seen Judge Knox carry
that same briefcase many a time." And then somebody
else will come along and say, "I saw Judge Knox come out
of the Chambers Street subway this morning at a certain
hour." And so there you would have that chain of circum-
stances which might well convince you that the statement

that I came downtown on the East Side Subway this morning was wholly and entirely false.

If those circumstances were of a character such as to exclude every reasonable hypothesis than that I came down on the West Side Subway you would have a right to say that you were satisfied that these other witnesses were telling the truth and that Judge Knox was falsifying and that he came down on the West Side Subway instead of the East Side Subway.

So, that is the test of whether or not circumstantial evidence shall be accepted. That is, that it should exclude every other reasonable hypothesis than that of the defendant's guilt. If it does that, you can rely upon it. If it does not do so, it is insufficient and the defendant should be acquitted.

The weight and credibility of the evidence offered by the Government is a matter for your determination. It has, as I have already said, not been denied by any witnesses that have been produced by the defendant.

And unless there is some reason about a witness's testimony that leads you to believe that he was not telling the truth, there is no reason why you should not believe the witnesses who have testified before you. If, however, you feel that any one of them has either out of an excess of zeal or some motive that he wishes to have the defendant convicted, departed from the narrow line, you may discount such testimony to the extent you think it should be dis-[fol. 222] counted. And if any of such testimony was wilfully false as given by any witness, you may, if you desire, cast out of the case the entire testimony of any such witness, upon the theory that being false in one particular it is false in all particulars.

If you feel that a witness has told some truth and some falsehood, or has exaggerated in some particular, you can believe the portion you think is true and disregard that which you think is false, and discount that which you think is exaggerated.

The testimony here is that the defendant came into the United States on the Haverford when he first arrived here a considerable number of years ago, and then he gave the name of Welwel Warszower, I think. Thereafter, when it came to the draft, he used another name, but said that he had been born in Russia and was a non-citizen, and upon that ground claimed exemption from service in the Ameri-

can Army. Thereafter when he went abroad he applied for a permit to leave the country as an alien. He received it, and according to the testimony that is here and the documentary evidence, and went abroad. And then subsequently, when he wished to go abroad again he made these statements that are alleged by the Government to be false and fraudulent. The question before you is were they false and fraudulent, and did he when he returned from the European trip on which he used the passport present and use the same when he sought to get through the immigration lines upon the steamer on which he returned. Each of us knows, and particularly each of us who has been abroad, that a passport is something that not only gives you the protection of this country, but it is a means of identification as well, and a very good means of identification; and as a citizen comes back to the country, of course the average immigration inspector cannot tell whether the man, whatever he looks like, is or is not a citizen, and so a pass- [fol. 223] port very frequently is utilized by a returning traveler to show his right to enter the country; and such use, if made by the defendant, and provided the representations upon which that passport was obtained were false, he can be convicted for the use he made of it in coming into the country on this trip in 1936, or whatever it was.

The defendant has not taken the stand in his own behalf. There was no necessity for him to take the stand. Under the system of laws upon which we operate in this country in criminal cases, the burden rests upon the Government to establish the guilt of the defendant who may be charged with a crime, and there is no obligation upon the defendant to prove his innocence. That is the privilege that is given to him by law to stay off the stand, and you should indulge in no presumption against him by reason of that fact. You should not even consider it or discuss it. That is something that has nothing to do with this case so far as the verdict to be returned is concerned. You are to consider whether the evidence introduced here upon behalf of the Government overcomes the presumption of innocence which the defendant possesses and whether beyond a reasonable doubt he has been proven guilty of the offense charged against him.

It has been argued here that the defendant believed that

the representations he made to the Government were true and correct. Were they? That is for you to say in the light of all the evidence. If honestly, openly and above-board and acting in good faith the defendant applied for a passport believing truthfully that he had been born in the United States, and that these other statements he made were true, he would not be guilty of this offense.

Each of us of course acquire certain information as we go through life, and if thereafter each of us who has acquired that information asserts it in good faith and decency, we are not liable for that.

[fol. 224] He also had a right to change his name; that is, to change his name from that which he bore when he came into the country. But here again, was that in good faith? Let us say he did change his name in good faith, did he go further and make statements which he knew to be false in getting this passport?

Mr. Earle has testified about the declaration that was made to him when the application was in the hands of Mr. Earle, with respect to whether the defendant had been out of the United States prior to the time at which he made application for the passport. You will recall what has been said about residence, and how Mr. Earle, after interrogating the defendant, wrote in some word to the effect that he had not been out of the United States, and that thereupon the defendant signed that application. According to the evidence he had previously been out of the United States. The Government has a right to know something about each person who is entitled to a passport, as to what has been their previous experience with respect to being abroad, and is entitled to truthful answers so that it can pass judgment upon whether or not the applicant should have the passport. So, I say to you if you find only one of the representations to have been false, that that is sufficient to allow a verdict of guilty to be rendered here, in the event you are satisfied beyond a reasonable doubt that such assertion was knowingly, fraudulently and wilfully made.

You may take with you any of the exhibits that have been in the case and examine them. You can recall the evidence. You can put together this crossword puzzle, if such it be, and, after you have done so, render a verdict that

you think in justice and in fairness not alone to the defendant, but also to the Government, is justified.

I have received a considerable number of requests on behalf of the defendant. I think I have substantially covered [fol. 225] them all. If there is any one to which you wish to direct my special attention you can call it to me by the number.

Mr. Fowler: No. 27.

The Court: You cannot base one inference that you draw from the evidence upon another inference. You can only draw one inference from one piece of testimony. You cannot predicate one inference upon another. You can say that this piece of cardboard here goes into this piece in the puzzle, and this into another, but you must fit them together. You cannot put one on top of the other and make a whole picture. They have to fit in so as to make out a complete case.

Mr. Fowler: May I take exception?

The Court: If you wish to you may call my attention to any specific matters. There are several of the requests I have declined, and I have written alongside them on the ones I have declined.

Mr. Fowler: May I except to that portion of your Honor's charge which states in words or substance if the jury are convinced that the defendant made a false statement as to his residence. I would ask your Honor to charge that they must be satisfied from the evidence that the defendant understood what residence was.

The Court: Whether or not he understood, what the Government wanted to know was whether or not he had been out of the country.

Mr. Fowler: What I mean is whether he had established his residence.

The Court: I think it means whether he had lived out of the country.

Mr. Fowler: My point is the jury must be satisfied beyond a reasonable doubt that the defendant knew what was in the mind—

The Court: That he must have had the purpose of misleading the Government. And so it is as to each of the [fol. 226] alleged false representations. He must have had

the conscious purpose and desire to mislead the officials with whom he was dealing.

The defendant may have an exception as to each of the charges submitted on his behalf that have not been covered or which I have declined to charge, and I will hand the same to the court reporter to incorporate in the record.

So you may take this case. It is no case for emotion; it is no case for sympathy; it is no case for anything except the desire to reach a fair and just verdict, and you will do that dispassionately and honestly.

I will discharge the two alternate jurors and I thank them for their services.

(The jury retired at 4.35 P. M.)

(At 5.15 P. M. the jury returned into the courtroom.)

The Court: We will wait a moment for Government counsel.

Mr. Werner: We apologize to the Court for being late.

(The roll of jurors was called and all present.)

VERDICT

The Clerk: Madam Forelady, have you agreed upon a verdict?

The Forelady: We have.

The Clerk: How say you?

The Forelady: Guilty.

The Clerk: Members of the Jury, listen to your verdict as it stands recorded. You say you find the defendant guilty and so say you all?

The Forelady: We do.

The Court: Do you with the jury polled.

Mr. Fowler: Yes, sir.

[fol. 227] (The jury was polled.)

The Court: Let the verdict be recorded.

Very well, Madam Forelady and Gentlemen of the Jury, you are discharged from further consideration of this case.

MOTIONS TO SET ASIDE VERDICT AND IN ARREST OF JUDGMENT

Mr. Aronow: I move to set the verdict aside as being contrary to law, contrary to the evidence, and contrary to the weight of the evidence.

The Court: The motion is denied.

Mr. Aronow: An exception, please.

I move an arrest of judgment.

The Court: The motion will be denied.

Mr. Aronow: Exception.

Mr. Aronow: Will your Honor fix the date of sentence for next Tuesday?

Mr. Dunigan: We move for immediate sentence, your Honor.

The Court: Is there anything to make it important why the defendant should be sentenced immediately?

Mr. Dunigan: I see no reason why sentence should be deferred.

I would like to call the attention of the Court to the fact that this defendant is presently illegally in the country.

Mr. Aronow: Your Honor, the jury, if they found any one of the four statements false, could then find the defendant guilty, and Mr. Dunigan not knowing what the jury has determined, it seems to me his statement falls.

The Court: I will fix the time of sentence as 10.30 Tuesday morning next and will continue the defendant on bail until that time.

(Adjourned to February 20th, 1940, 10.30 a. m., for sentence.)

[fol. 228] New York, February 20, 1940, 10.30 A. M.

Met pursuant to adjournment.

Mr. Aronow: If your Honor please, there is one additional ground I should like to urge for setting the verdict aside. If you will recall, I made such a motion when the jury returned the verdict the other day. My motion is this: it appears on the fact of the indictment that the alleged false statement in the passport application was made on July 18, 1936, and that the passport issued thereon was

alleged to be used on the 30th day of September, 1937. The statute of limitations is three years. Therefore, a prosecution for the making of the said false statement would be barred by the statute. It is our contention that the alleged use, which of necessity must be based upon making a false statement in the application, is consequently barred.

The Court: Why is this?

Mr. Aronow: Because in a criminal statute you will find the Government creates the crime, and when it creates a statute of limitations it is in the nature of an amnesty and hence it does not require the defendant to carry the proof of innocence around with him all his life.

The Court: It was suggested by the prosecution that there was a false statement.

Mr. Aronow: The false statement was made beyond the three-year period, whereas the use was made within the three-year period and one cannot be a crime without the other. In other words, he could have used the passport, and if the statements in the application would be truthful, then there would be no crime. Naturally you have the two ingredients, you must have the false statement and the use.

The Court: Within the three-year period. The statute denounces anybody who uses a passport—it is denounced as a crime—that is obtained on a false statement.

[fol. 229] Mr. Aronow: That is true, your Honor.

The Court: Motion denied.

Mr. Aronow: Exception. May the same motion be deemed to be made as at the close of the Government's case and also at the close of the entire case?

The Court: Yes.

Mr. Fowler: If your Honor please, on the sentence, I am completely satisfied that this matter is in your Honor's hands and will result in a sentence solely for what the jury has convicted this defendant of and nothing else. So anything that I say here this morning will be directed just to that. This man is 44 years old, he is married and has one child, a daughter. He holds a rather important position as president of the International Workers Order; that is more or less a charitable insurance, made up possibly of 170,000 odd members. He draws no salary, nor has he ever drawn any. He has worked in the interest of the people who are members of that organization; they are

very poor. That corporation has paid out some five million dollars in benefits. He has a reputable standing as a member of this community for several years.

The offense he has been convicted of has not been treated by the courts in the past as a most heinous crime. The sentences in those cases seem to have run from a suspended sentence up to about eighteen months after a trial. If this man is to be sentenced, and I know he is to be for what he has done, I submit that this man should be leniently dealt with.

The Court: What purpose did he have in mind?

Mr. Fowler: You ask me that, your Honor, and after the study I gave to this case before I consented to try it, I may say to you I cannot tell you otherwise than that I have never tried to mislead you or any other court in my life; I can't tell you otherwise than that I firmly believe that this [fol. 230] defendant believed in what he was doing, because there was no object.

The Court: But he has not gone on the stand and explained why he should believe it.

Mr. Fowler: He has not gone on the stand, that is true, your Honor, and it was solely on my advice that he did not go on the stand. It was my advice that this man should keep out of the trial as much as possible, that is of course a personal equation, and if I am wrong in that it is not the first mistake that I have ever made and it will not be the last mistake I will make in the practice of law.

I know that the Government has not satisfied me beyond a reasonable doubt that the defendant wilfully misrepresented anything, because it was so childish for this defendant to do what he said he did. That is what creates ninety per cent of our social problems on behalf of the people who do not give these matters proper thought.

The Court: Is he deportable?

Mr. Fowler: Yes, your Honor, he is deportable. A man in his position, convicted as he has been, there is no punishment that your Honor can mete out to him which will be more or less than an anti-climax. This man is broken so far as his life is concerned. He is held out as president of that association to all those members as a man who respects the law. He has never been accused heretofore of breaking the law. This is his first contact with the criminal law,

this is his first contact with a criminal offense of this or any other country. He has never offended anyone before.

The Court: Of course in a case of this nature with a passport, its good is largely destroyed when people go around other countries with false passports, and other nations say here is another American passport that means nothing. I had these passport cases twenty-five years ago. I remember the first case I had as a prosecutor was that of United States against Carl Rodin, and I recall it distinctly. I [fol. 231] prosecuted that case in 1914. Of course passports have got to mean something. In that case that I prosecuted they were getting passports falsely and sending German reserve officers abroad. Now that sort of thing is likely to involve us in all sorts of trouble.

Mr. Fowler: I agree with your Honor completely. A jury has said that this man has broken the law.

The Court: I have no feeling against the defendant whatsoever personally at all. I do feel particularly in a crime of this kind at this time, in a time like this, we have to uphold the dignity, the sanctity and authority of American passports, because it means so much to us.

Mr. Fowler: I agree with you there, your Honor. All I am pleading for is that your Honor consider just as far as you judicially can, the fact that the man's punishment right now is complete.

The Court: No, it is not complete as far as the deterring influence is concerned.

Mr. Fowler: You are right there, your Honor. I mean so far as his life is concerned. So far as the dignity of the law is concerned of course your Honor has a duty.

The Court: Is he willing to leave the country without deportation proceedings?

Mr. Fowler: If your Honor please, this country has become his home.

The Court: He will probably be deported anyhow.

Mr. Fowler: I don't think there is any question about his being deportable.

The Court: He is illegally in the country anyhow.

Mr. Aronow: There may be some doubt about that, your Honor.

Mr. Fowler: A jury has said so. I think the deportation question is a matter that is open.

The Court: What I have in mind, if he is going to leave the country, he cannot get back here. The sentence may be one thing—

[fol. 232] Mr. Aronow: I would rather your sentence be predicated not on his leaving the country. This has become his home, your Honor. He has lived here a number of years. He has married here. His daughter was married only the last few months. It is their home.

The Court: Is there any distinction between this case and the Browder case?

Mr. Fowler: Yes, your Honor, this man was never in trouble before, never had any contact with the criminal law.

The Court: I want to know are there any distinguishing features.

Mr. Aronow: Yes, your Honor, in the sense that Mr. Browder had a prior record, which the Government urged upon the Court.

The Court: What was that?

Mr. Aronow: It was during the war, when he was prosecuted for an offense.

Mr. Fowler: I think he served some time, your Honor.

The Court: What do you have to say, Mr. Dunigan?

Mr. Dunigan: The only thing I have to say, your Honor has heard the evidence. Insofar as the deportation part is concerned, I can only say in our opinion he is subject to deportation. Deportation proceedings of course depend on some other department. We cannot order him to be deported as far as we are concerned. With respect to this case and that of Browder's, I can say that so far as the evidence is concerned here, it presented a very aggravated case. The defendant was never entitled to an American passport, and in order to obtain one it was necessary to tamper with the vital statistics of this country, and in that sense I think the evidence showed it to be a very aggravated case.

Mr. Fowler: On that deportation issue, could we leave it this way. My thought is Mr. Dunigan's thought, and it was as I was talking to you, that it will go to its own department. [fol. 233] I think the statute is clear on that, as to whether he is deportable, and nothing we could say can change it.

The Court: Was his daughter born in this country?

Mr. Fowler: Yes, sir.

The Court: And is his wife American born?

Mr. Fowler: Yes, your Honor, I understand she was born in Illinois.

Mr. Aronow: Yes, your Honor, I think she was born in Illinois.

Mr. Fowler: He could make all of these defenses before a board of deportation, on application, but I would not want to even intimate to your Honor that we prefer that those proceedings be not brought. They have got to be brought. They should be brought. I think your Honor would very properly take that into consideration in passing sentence on the defendant today. I mean it would be a horrible thing if we did not take that into consideration, and then if the board met and did deport him, it would be hitting him twice.

The Court: How many of these passport frauds are there?

Mr. Fowler: You mean generally speaking?

Mr. Dunigan: It seems to be pretty prevalent, your Honor, from my knowledge of investigating these matters.

The Court: Do you have some more cases of this nature?

Mr. Dunigan: Yes, your Honor.

Mr. Fowler: How many?

Mr. Dunigan: I can't answer you that. There are, however, indictments pending in this court. That I can say. That is a matter of public record.

Mr. Fowler: If that has been so prevalent, it must have been prevalent for a long time. It seems queer to me that they have all broken out at one time.

The Court: Of course the important thing is this question of conditions abroad today. Has the defendant anything to say?

[fol. 234] The Defendant: No, your Honor.

Mr. Dunigan: I will say this, your Honor, with respect to deportation I can only report that he is subject to deportation. The law is clear that he would necessarily be deported. He is subject to deportation. I would suggest to your Honor, if you take that into consideration, that you make that part of the sentence, that he be deported or that he leave the country after he has served whatever sentence you may impose upon him today.

Mr. Fowler: I would like to stress that his conviction does not necessarily mean that he as an alien will be deported.

The Court: Isn't there some statute under which I can direct that as an alien he be deported?

Mr. Werner: You can make a recommendation as to that, your Honor.

Mr. Dunigan: As far as directing, I don't know about the statute as to that.

Mr. Werner: I am informed there is no such statute, your Honor, but you may make a suggestion as to deportation, to the department.

The Court: Browder used a passport twice, did he?

Mr. Werner: Yes, your Honor, he did.

Mr. Dunigan: The evidence in the Browder case showed that a passport was used twice.

The Court: Different passports?

Mr. Dunigan: The same one.

Mr. Aronow: It also showed he obtained prior passports under three different names. Here we have only one use alleged, and only one use prosecuted. In the Browder case it was alleged, and the Government contended, that on three different occasions, over a period of years, that Browder obtained passports under three different names, and he was prosecuted for two uses before the court this time.

[fol. 235] Mr. Dunigan: Browder, had he so chosen, could have obtained a passport. He was a native born American citizen. This man was never under any circumstances entitled to a passport. In order to obtain one it became necessary for someone to tamper with vital records and to make false and fraudulent records in Atlantic City. Under no circumstances could this defendant obtain an American passport legally.

Mr. Aronow: That is a forcible argument and if it had been advanced before the Court on the occasion of the Browder sentence it might have operated for leniency. This is the first time that it has been stated that Browder could have obtained a passport without the necessity of a false statement.

SENTENCE

The Court: I do not know what to do in connection with it, but the sentence of the Court in this case is that the defendant be committed to the custody of the Attorney General for confinement in a penitentiary for a period of two years.

Mr. Aronow: Will your Honor grant bail pending appeal.

The Court: I will give you an opportunity to apply to the Circuit Court of Appeals. The Supreme Court rules provide that bail shall not be allowed pending appeal unless it appears the appeal involved has substantial questions which should be determined by the appellate court.

Mr. Aronow: There is a substantial question here, your Honor.

The Court: I cannot agree with you on that. You can submit it to the appellate court.

Mr. Aronow: Will you continue bail, your Honor?

The Court: My reason for refusing bail is that I tried the case and I considered the briefs submitted by you and I listened *with* your argument with considerable care, and I made an examination of the law independently of what was brought to my attention by you, and it seems to me that there is no substantial question of law involved in the case. [fol. 236] So far as the allegations of the Government are concerned and the proof in support of it, that is uncontradicted, and I feel in accordance with the requirements of the Supreme Court rule, that I must say that I will not give bail, but I will stay the execution of sentence for one week to permit you to apply to the Court of Appeals for bail.

The Clerk: Is the defendant to be remanded?

The Court: No, he is on bail.

Mr. Werner: Is your Honor making a recommendation with respect to deportation?

The Court: Have I the power to make a recommendation? If so, I will make a recommendation that he be deported after he has served his sentence.

[fol. 237] IN UNITED STATES DISTRICT COURT

C. 106/291

U. S. Criminal Code Section 220 Title 22 U. S. C.

Unlawfully Using a Passport Obtained by False Statements
in the Application Therefor

THE UNITED STATES OF AMERICA

VS.

WELWEL WARSZOWER, Alias Robert William Wiener, Alias
William Wiener; Alias A. Blake, Alias A. Benson

JUDGMENT—February 20, 1940

On motion of the United States Attorney, Ordered Sentence

It is thereupon ordered and adjudged that the above named defendant be committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment in a penitentiary. For and during the term and period of Two Years. The Court recommends that the defendant be deported at the expiration of prison sentence.

Execution of sentence stayed for One Week. Bail continued to 2/27/40.

Jno. C. Knox, United States District Judge.

[fol. 238]

GOVERNMENT'S EXHIBIT 1

(Photostat)

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DESCRIPTION AND PHOTOGRAPH OF APPLICANT

Height 5 feet, 2 inches

Hair Blond

Eyes Gray

Distinguishing marks or features _____
(Note any marks or scars on hands or face)

Place of birth Atlantic City, N.J.
(City and State)

Date of birth Sept 5th 1896
(Month, day, and year)

Occupation Advertising manager & accountant

ADDRESS

I request that my passport be mailed to the following address:

Name Robert Williams W YORK
NEW YORK
Number and Street 893 Eastman Park North, of Rocher
City and State Brooklyn, N.Y.

NOTE: A passport will not be mailed to a local address unless the local address is the permanent place of permanent residence.



I solemnly swear that the statements made on both sides of this application are true and that the photograph attached hereto is a likeness of me.

OATH OF ALLEGIANCE

Further, I do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely, without any mental reservation or purpose of evasion; so help me God.

Robert Williams NY
(Signature of applicant)

JUL 18 1933
Subscribed and sworn to before me this _____ day of _____, 19____

Robert Williams
(Signature of witness)

Notary or Consul

Chief of the Department of State, N Y City

AFFIDAVIT OF IDENTIFYING WITNESS

I, the undersigned, solemnly swear that I am a citizen of the United States; that I reside at the address written below my signature hereto affixed; that I know the applicant who executed the affidavit hereinbefore set forth to be a citizen of the United States; that the statements made herein by the applicant are true to the best of my knowledge and belief; further, I solemnly

swear that I have known the applicant personally for 9 years

If witness has been issued a passport, give number and date of issue or approximate date of issue.

J. C. Lowry
(Signature of witness)
41 Broadway, N.Y.C.
(Business address of witness)

No. _____ Date of issue _____

No fee or other money will be collected as witness to a passport application if he has received or expects to receive a fee for his services in connection with the execution of the application or obtaining the passport.

Subscribed and sworn to before me this JUL 18 day of Jul, 19____

Robert Williams
(Signature of applicant)

Notary or Consul

Chief of the Administration, Department of State, N.Y. City

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[fol. 239]

GOVERNMENT'S EXHIBIT 2

This Exhibit reads in part as follows:

New York Agency 7/21/36

332207 Wiener, Robert William

[fol. 240]

GOVERNMENT'S EXHIBIT 3

(Photostat)

Passport Bureau
Nyc

eff. 1. July 21, 1936

7/2/40
ES

EXHIBIT 3
U. S. Dist. Court
S. D. of N. Y.
FEB. 6 1940

Dear Sir -

Please, give bearer my passport. Am too
busy to call personally.

Thanks.

Respectfully,

Robert William Steiner

PASSPORT RECEIVED BY
ME THIS JUL 22 1936

Rae White
325 W. 4th St
Nyc

BLANK PAGE

[fol. 241]

GOVERNMENT'S EXHIBIT 4

Blank passport of the United States, Page 2 is as follows:

"I, the undersigned, Secretary of State of the United States of America, hereby request all whom it may concern to permit safely and freely to pass, and in case of need to give all lawful aid and protection to — — —, a citizen of the United States.

The bearer is accompanied by his wife — — —. Minor children — — —, — — —.

Given under my hand and the seal of the Department of State at Washington. — — —, — — —,
Cordell Hull." (Seal.)

[fol. 242]

GOVERNMENT'S EXHIBIT 5

Carbon copy of Government's Exhibit 2.

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Form No. 1
A Statement of Landing
Immigrants and
Naturalization Service

Record on this blank United States citizens and citizens of insular possessions of the United States arriving at a port of continental United States from a foreign port or a part of the insular possessions of the United States, and such citizens arriving at a port of said insular possessions from a foreign port, a port of continental United States, or a port of another insular possession.

Number

LIST OF UNITED STATES CITIZENS

(FOR THE IMMIGRATION AUTHORITIES)

S.S. FORRESTER sailing from LA HAVRE - France, SEPTEMBER 20TH 1937, Arriving at Port of NEW YORK - U.S.A. - SEPTEMBER 20th 1937

No. of List	NAME IN FULL		AGE		Sex	Status	IF NATIVE OF UNITED STATES INSULAR POSSESSION OR IF NATIVE OF UNITED STATES, GIVE DATE AND PLACE OF BIRTH (CITY OR TOWN AND STATE)	IF NATURALIZED, GIVE NAME AND LOCATION OF COURT WHICH ISSUED NATURALIZATION PAPERS, AND DATE OF PAPERS	ADDRESS IN UNITED STATES
	Family Name	Given Name	Yrs.	Mo.					
1	ERKINS	Larry	28		M		Passport Number 291292	By Marriage - Dec. 28.1917 - NYC NY	1. West 21 St. N.Y.C. - NY
2	ELICK	Thomas	21		M	S	May 6.1916 - Clanton - Pa.	III748	327 W. 12th St. Oklahoma City - Okl.
3	EROL	Benjamin	28		M	S	Nov. 26.1909 - N.Y.C.	336123	1016 8th Ave. - N.Y.C. - NY
4	ERLER	Klemmer	28		F	S	Nov. 17.1900 - Passaic - N.J.	7974	" " " "
5	EROL	Sarah	28		F	M		470616	Born in London - Aug. 20.1878 - of Ameri- can Parents
6	ERLER	Charles	28		M	S	May 30.1908 - Rahway - N.J.	291	Townsend 980 - 8th Ave. - N.Y.C.
7	ERIN	Julius	21		M	S		126208	Southern District of N.Y.C. - Feb. 17.1914
8	STADOCK	Sohn	24		M	M	Sept. 22.1873 - N.Y.C.	464481	Widrick Hotel - 34th St. 8th Ave. N.Y.C.
9	"	Hilda	21		F	M	Feb. 4.1876 - N.Y.C.	461362	32 East 70 St. N.Y.C. - NY
10	SULLIVAN	Margaret	28		F	S	Aug. 26.1904 - St. Anne - Ill.	466236	" " " "
11	SLIFT	John	25		M	M	Aug. 22.1902 - St. Louis - Mo.	124377	4117 Central Ave. - Indianapolis - Ind.
12	"	Jessie	28		F	M	March 7.1904 - " "	"	Indian Creek Island - Miami Beach - Fla.
13	THOMAS	Gregory	30		M	S	Oct. 19.1907 - N.Y.C. -	380613	" " " "
14	THOMAS	Max	27		M	M		4825	Superior Court of Chicago - 1904
15	THOMAS	Margaret	28		F	M	Nov. 30.1906 - Brooklynville - Maryland	145945	3920 Lake Shore Drive - Chicago - Ill.
16	THOMAS	Agnes	30		F	M	Oct. 18.1876 - N.Y.C.	383177	3908 N. Charles St. Baltimore - Md.
17	WATER	Janet	28		F	M	July 28.1908 - Long Branch - N.J.	104277	425 Park Ave - N.Y.C. - NY
18	WATER	William	26		M	S	Sept. 30.1900 - Offord - N.J.	365141	375 Park Ave. - N.Y.C. - NY
19	WATER	Joseph	28		M	M		367910	Delmerice 80th St. & Park Ave. N.Y.C.
20	WATER DOLE	Hilda	21		F	M	June 5th 1886 - Boston - Mass	"	10644 Bellagio Rd. - Bel Air - 146 Ave. also - Cal.
21	WELSON	Pearl	24		F	S	Feb. 26.1912 - Brooklyn - NY	121208	" " " "
22	WELSON	Julia	24		F	M	March 3.1902 - N.Y.C. - NY	117908	Cotton Hotel 25th St. 8th Ave. N.Y.C.
23	WELSON	Angelica	23		F	S	July 3.1914 - Beverly - Mass	278237	28 East 39th St. - N.Y.C. - NY
24	WELSON	Janet	21		F	S	Jan. 22.1916 - N.Y.C. - NY	446222	" " " "
25	WELSON	Friedrich	29		M	M		7752	U.S. District Court - N.Y.C. - July 8 1937
									100 Central Park St. - N.Y.C.

5	SMITH	Sarah	29	F	M	470518	Born in London - Aug. 20. 1878 - of Ameri- can Parents	-	-	-
6	SMITH	Charles	29	M	M	281		Townsend 920 - 5th Ave. - N.Y.C.		
7	SMITH	Julius	31	M	M	128898	Southern District of N.Y.C. - Feb. 17. 1914	Wardwick Hotel - 54th Str. 5th Ave. N.Y.C.		
8	SMITH	Sohn	34	M	M	484481		33 East 70 Str. N.Y.C. - NY		
9	SMITH	William	31	F	M	484382		-	-	-
10	SULLIVAN	Margaret	29	F	S	488236	Aug. 22. 1894 - St. Anne - Ill.	4117 Central Ave. - Indianapolis - Ind.		
11	SWIFT	John	25	M	M	124277	Aug. 22. 1892 - St. Louis - Mo.	Indian Creek Island - Miami Beach - Fla.		
12	SWIFT	Jessie	22	F	M	-	Feb. 7. 1894 - -	-	-	-
13	THOMAS	Gregory	30	M	M	280812	Oct. 19. 1907 - N.Y.C. -	19 West 68th Str. - N.Y.C.		
14	THOMAS	Max	27	M	M	4825	Superior Court of Chicago - 1904	3980 Lake Shore Drive - Chicago - Ill.		
15	THOMAS	Margaret	28	F	M	148845	Nov. 20. 1905 - Brooklynville - Maryland	3908 N. Charles Str. Baltimore - Md.		
16	THOMAS	Agnes	30	F	M	282177	Oct. 12. 1876 - N.Y.C.	485 Park Ave - N.Y.C. - NY		
17	WALKER	Janet	29	F	M	104877	July 22. 1888 - Long Branch - N.J.	375 Park Ave. - N.Y.C. - NY		
18	WALKER	William	26	M	M	365141	Sept. 30. 1880 - Offord - N.J.	Delmarces 88th Str. & Park Ave. N.Y.C.		
19	WALKER	Joseph	28	M	M	347810	Superior Court of Los Angeles - Cal. Dec. 13. 1935	10444 Bellagio Pl. - Bel Air - Los Ang. Cal.		
20	WALKER	Hilda	31	F	M	-	June 8th 1884 - Boston - Mass	-	-	-
21	WALKER	Fearl	24	F	S	181808	Feb. 20. 1913 - Brooklyn - NY	Gotham Hotel 85th Str 8th Ave. N.Y.C.		
22	WALKER	Julia	24	F	M	117308	March 3. 1883 - N.Y.C. - NY	25 East 38th Str. - N.Y.C. - NY		
23	WALKER	Angelica	23	F	S	278837	July 3. 1914 - Beverly - Mass.	-	-	-
24	WALKER	Janet	31	F	S	448222	Jan. 22. 1916 - N.Y.C. - NY	-	-	-
25	WALKER	Friedrich	29	M	M	7752	U.S. District Court - N.Y.C. - July 8. 1937	100 Central Park 5th - N.Y.C.		
26	WALKER	Emma	28	F	M	212610	-	-	-	-
27	WALKER	Edith	28	F	M	3125	Jan 4. 1872 - Binghamton - N.Y.	964-12 Ave. Beth - St. Petersburg - Fla.		
28	WALKER	Robert	41	M	M	332207	Sept. 5. 1886 - Atlantic City - N.J.	735 Walton Ave. - Bronx. NY.		
29	WALKER	Maudie	30	F	M	368289	May 12. 1877 - Chicago - Ill.	Plaza Hotel - N.Y.C. - NY		
30	WALKER	Maria	36	F	S	278918	District Court of New York - April 11. 1932	1030 - 5th Ave. - N.Y.C. - NY		

John M. Jones
Aug 15 1937

Line.
Owners
Local Agents

7

IMPORTANT NOTICE.—1. Great care should be taken not to place on this list the name of any passenger who was not born in the United States or who has not taken out final naturalization papers.
2. Where one or more members of a family are aliens, the names of all such members should be recorded upon the alien manifest. Suitable notation may be made upon such manifest opposite the names of those members who claim citizenship.
3. Failure to observe the terms of this notice may result in delay to passengers at the port of arrival.
4. List on this form only United States citizens or citizens of an insular possession of the United States.

Manifest of Alien Passengers for the United States Immigration Officer at the Port of Arrival on the S. S. Bremen.

The manifest is of passengers sailing from Bremen May 30, 1932, arriving at the Port of New York on June 5, 1932.

Line 26 of the manifest indicates as follows:

1. No. on list: 26.
2. Head tax status: —.
3. Name in full: Family name: Warszower; given name Welwel.
4. Age: 38 years.
5. Sex: M.
6. Married or Single: M.
7. Calling or Occupation: Journal.
8. Able to Read: Y: Read what language: English.
Write: Y.
9. Nationality: Without.
10. Race or People: Russia.
11. Place of Birth: County: Russia. City or Town, State or Province or District: Kiew.
12. Immigration Visa, Passport Visa or Reentry Permit No. 794594/798974.
13. Issued: Place—Wash. Date, p 3.10.32.
14. Data Concerning Verification of Landings, etc.: —.
15. Last Permanent Residence: Country—U. S. A. City or Town, State, Province or District: Bronx.

[fol. 245] 16. No. on list: 26.

17. Name and Complete Residence of nearest relative or friend in country whence alien came or if none there, then in country of which a citizen or subject: Brother Boris Warszower, Kiew, U. S. S. R.

18. Final Destination in U. S. A. Its Territories or Possessions, State: New York, City or Town: Bronx.

19. Whether a ticket to such final destination: N.

20. By whom was passage paid: Self.

21. Whether in possession of \$50 and if less, how much: Y.

22. Whether ever before in the United States and if so, when and where (last residence only) Yes.

Year or period of years: 1914-1932.

Where: Bronx.

Date of last departure: 4.19.32.

23. Whether going to join a relative or friend; state name and complete address and if relative, exact relationship:

Wife: Esther Warszower, 745 E. 175 Str. Bronx, N. Y.

24. Purpose of coming to United States; whether alien intends to return to country whence he came after engaging temporarily in laboring pursuits in United States: No.

Length of time alien intends to remain in the United States: Alw.

Whether alien intends to become a citizen of the United States: —.

25. Ever in prison, or almshouse or institution for care and treatment of the insane or supported by charity. If so, which: No.

26. Whether polygamist: No.

[fol. 246] 27. Whether an anarchist: No.

28. Whether a person who believes in or advocates the overthrow by force or violence of the Government of the United States or all forms of law: No.

- 29. Whether coming by reason of any offer, solicitation, promise or agreement; expressed or implied, to labor in the United States: No.
- 30. Whether excluded or deported within one year: No.
- 31. Whether arrested and deported at any time: No.
- 32. Condition of health, mental and physical: Good.
- 33. Deformed or crippled; nature, length of time and cause: No.
- 34. Height: Feet, 5, inches 2.
- 35. Complexion: Fair.
- 36. Color of Hair: Bl. Eyes: Gr.
- 37. Marks of identification: None.

At the bottom of the manifest is written M. Stern, Insp.

6/5/32 3:45 P. M.

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BAGGAGE DECLARATION AND ENTRY

BEFORE FILING OUT THIS DECLARATION READ CAREFULLY INSTRUCTIONS ON BACK OF THIS SHEET
 IF STOPPED OR INTERVIEWED, RETURN TO FURNISH OF VERBALLY

No 317621

Name of Passenger Robert William Wilson Normandie Port of New York
 I, the undersigned, declare that I am a resident of the country of United States of America

that I resided in said country from April 1, 1933 to date
 that I reside at No. 735 Waller Street Brooklyn State, New York
 that I am a citizen of the country of U.S. that I last sailed from the United States on S.S. Normandie on Sept. 1, 1933 from New York
 that I am accompanied by the following named members of my family and household who are included in this declaration:

that I and those who accompany me are all residents of the same country and our baggage is enumerated below:

BAGGAGE:	NUMBER OF TRUNKS, BAGGAGE, ETC.	OTHER PACKAGES	TOTAL PACKAGES	LETTER UNDER WHICH BAGGAGE WILL BE PLACED ON FILE
	1		1	W

FOR CUSTOMS OFFICER'S NOTATIONS ONLY
 (Over by Passenger) (Pour les employés de la douane seulement) (Da riempire solamente dagli ufficiali di dogana) (Dole para los funcionarios de los aduanas de aduanas)

TO BE FILLED OUT BY PASSENGER	VALUE	RATE	DUTY
1 small clock	\$ 4.00		
1 bottle perfume	2.25		
2 Hand bags	5.50		
2 Ladies Compacts	6.25		
1 Ladies sweater	10.00		
1 Bracelet	1.00		
2 Key rings	1.50		
1 Liquid set	4.50		
1 model boat	2.50		
2 Ladies scarfs	10.20		
Table cloth - napkins	8.25		
1 Ladies sweater	5.65		
TOTAL OF THIS SHEET	62.60		

Carried forward from continuation sheet
 TOTAL DUTY OR FINE \$

DECLARATION OF RETURNING RESIDENT OF THE U. S.
 I further declare that I have fully set forth herein all the articles in my baggage or on my person, or in the baggage of or on the person of any accompanying person, that are NOT wearing apparel, articles of personal adornment, toilet articles, and similar personal effects, and all articles that are intended directly or indirectly for sale or for the use of any other person, together with the price actually paid for purchased articles, or, in the case of articles obtained otherwise, the fair value thereof to the best of my knowledge and belief, and that this declaration is made with the knowledge and belief that failure to declare any such article or any false statement in regard thereto will subject me to personal penalties and the articles involved to seizure.

Robert William Wilson, Passenger.
 Declared to before me 193 and
 baggage examined and found correct unless otherwise noted.
 Number of packages examined 9 and number of stamps
 used 1
 Baggage stamps No. 572561

[fol. 248]

GOVERNMENT'S EXHIBIT 9

Birth register of Atlantic City, New Jersey, for the period 1880 to 1896, inclusive. Government's Exhibits 10 and 11 consist of two pages of this volume.

Birth Register

WEEK REGISTERED.	DATE OF BIRTH.	NAME OF CHILD.	SEX.		COLOR.		WARD.	STREET AND NUMBER.
			M.	F.	Wh.	Col.		
Sept 14/16	Aug	21/2 James H. Shaw	1		1		3	1142 7th Ave
		23 Herbert	1		1		1	19 S. Delaware
		23 Edgar Miller	1		1		3	1313 Webster
		23 Anthony	1		1		2	1307 Cedar
		24 Samuel Crawford	1		1		3	872 Cedar
		25 Amy Franklin	1		1		6	102 S. Thacker
		27 William Dwyer	1		1		6	211 N. Wisconsin
		27 Helen	1		1		1	628 Madison
		28 Albert Charles Shrie	1		1		1	114 S. Exchange
		30 Nora May Conner		1	1		6	Temple B. St.
		31 Joe H. Williams	1			1	6	15 Wisconsin St.
		31 Annie Schen		1	1		3	2 Kane Street
		✓ Mary Emma		1	1		6	3723 Clarke
		2 Earl Walter Reese	1		1		4	22519 Austin
		4 Ray	1			1	3	1621 Cedar
		4 Nell Ann Nickerson		1		1	1	Jan 911 Cedar
		5 Ethel Davis		1	1		1	133 1/2 Locust
		6 D. Rutha Snow	1		1		6	2123 Austin
		7 Joseph Walter	1		1		1	37 N. Lincoln
		7 Lillian Ann Brown				1	2	1011 Cedar
		5 Helen J. & Helen Light		1	1		3	1421 Cedar
		7 James Shirley	1		1		3	124 N. New York
		16 Charles Allen Sharp			1		3	2017 Cedar
		19 Edward Arthur Boyd		1	1		1	121 S. Corn Ave
		19 Cecelia Brown		1		1	3	116 N. Kentucky
		22 Bertha Brown		1	1		1	125 N. Corn
		3 Joseph (Dennis) Williams	1		1		3	S. Williams St.
		5 Robert William Brown	1		1		4	2224 Cedar

[fol. 250]

GOVERNMENT'S EXHIBIT 11

(Photostat)

Birth Register

NAMES OF PARENTS	OCCUPATION OF FATHER	NAME OF PHYSICIAN	RESIDENCE OF PHYSICIAN
John Rios & Anna Eustace	Hotel Proprietor	Dr. A. Fleming	Asheville City N.C.
John E. Hershman & Margaret Dwyer	Musician	Geo. W. Conley	"
Eugene Miles & Lucia M. L.	Blacksmith	J. B. Thompson	"
William Heston & Maria Heston	Clerk	W. B. Thompson	"
Charles Croft & Maria M. Croft	Lawyer	Walter C. Long	"
Ang. Franklin & Mary Menden	Tape Stenger	W. Ingram	"
Henry Roney & Willie Adams	Barber	Walter C. Long	"
William J. Hahn & Emma Hahn	Carpenter	W. B. Thompson	"
Albert Rios & Anna Rios	Scholar	W. B. Thompson	"
James Rios & Mary J. Rios	Lawyer	Walter C. Long	"
Geo. H. Mary Messing		Geo. H. Feltner	"
James Lakin & Mary Brown	Shoemaker	E. C. Allen	"
Henry J. Brown & Annie Brown	Mechanic	Walter C. Long	"
James Rios & Kate M. Rios	Plaster		"
Ang. Rios & Maria Rios	Barber	J. A. Rios	"
Geo. W. Rios & Maria Rios		J. A. Rios	"
Wm. W. Davis & Nellie C. Davis	Carpenter	W. B. Thompson	"
David H. Davis & Samuel C. Davis	Shoemaker	Walter C. Long	"
Joseph Malster & Annie T. Malster	Butcher	W. B. Thompson	"
Richardson & Anna Johnson		J. A. Rios	"
Wm. Rios & Anna Rios	Mechanic	W. Ingram	"
Wm. H. Rios & Maggie Rios	Plumber		"
Wm. Rios & Anna Rios	Barber	J. A. Rios	"
James Rios & Anna Rios	Barber	Wm. H. Rios	"
Wm. Rios & Anna Rios	Artist	W. Ingram	"
Alon Rios & Anna Rios	Scholar	Wm. H. Rios	"
Wm. Rios & Anna Rios	Hotel Proprietor	W. B. Thompson	"
Salomon Rios & Anna Rios	Barber		"

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BUREAU OF IMMIGRATION

NOTE.—Request for each extension should show good cause, and must be sworn to before an American Consular Officer prior to expiration of permit and must be forwarded to the Commissioner General of Immigration, Washington, D. C., together with a fee of three (\$3.00) dollars, which fee shall be remitted by draft, express money order, or foreign exchange, payable in American dollars at a bank in the United States, to the Commissioner General of Immigration.

EXTENSIONS

Washington, D. C.

The validity of this permit is hereby extended to the _____ day of _____

人。即

Approved:

Commissioner General of Investigation

Assistant Secretary of Labor

Washington, D. C.

The world of a singer is never limited to the stage.

九

Approved:

Continued from Page 10

Available Securities of Labor

RECORD OF INVESTIGATION

The alien gained in the pursuit

arrived in the United States on the _____ date _____, 19____, at _____.

on the Steamship **Thomson** in the **North Atlantic**

and was legally

FINAL DISPOSITION OF CASE

[fol. 252]

GOVERNMENT'S EXHIBIT 13

(Photostat)

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EXHIBIT 13

APPLICATION FOR REENTRY PERMIT

7194173

U. S. DIST. COURT
2/21/35U. S. DEPARTMENT OF LABOR
IMMIGRATION SERVICE

No.

To the HONORABLE COMMISSIONER GENERAL OF IMMIGRATION:

The undersigned, being an alien, hereby makes application for a reentry permit, as provided for in Section 1 of the Immigration Act of 1924, and submits the following data in support thereof:

The name I now use is (Print full name) Wlswel WargawerName of steamship Wargawer (City) Philadelphia, Pa.LAST arrived in the United States Port of arrival Philadelphia, Pa.Date of arrival March 27, 1934.Name under which admitted Wlswel WargawerFather's name Solomon Wargawer Mother's maiden name Beatie Rifin FeldmanAt time of entry my age was 21 - yr. - 1 mo. (Single) Single My occupation was BookkeeperPlace of birth Kiev, Russia Date Sept. 5, 1892Last permanent residence before date of entry Russia KievName and complete address of nearest relative or friend in country whence you came Father - Solomon Wargawer Kiev, Russia.Name and address of person to whom destined at time of last entry Sister - Mrs. Anna Geer, Pittsburgh, Pa. 2 Robert St

Personal description of date of application:

Age 23 Height 5 ft. 3 1/2 inches Weight 155 lbs.Complexion Fair Color of hair Blonde Color of eyes GreenMarks of identification None Slight scar above left eyeBy whom accompanied at time of last entry alone

Applicant's present residence in the United States:

(Street and number) a/sa W. Wainer 745 East 27th St. apt 36.(City or town) Brooklyn, N. Y. (State) N. Y.Residing at the above address four years four monthsMy temporary address abroad will be c/o American Express Co. Berlin, Germany.

Name and address of nearest relative (give name of husband or wife if married)

Married - Wife - Mother Same address, 745 E 175th Brooklyn, N.Y.Nature of business or employment JournalistPlace of business or employment unemployed 7 months

Name of employer

Port and date of proposed departure from the United States New York March 28th, 1935.Name of vessel on which sailing STATEN Length of proposed absence one yearCountries to be visited Germany, Poland, etc.Reasons for going abroad travel and visitMy last application for return permit was filed None Application numberWill you await permit if not issued in time for proposed sailing? yesMoney Order No. 33829 in the sum of three dollars, payable to the Commissioner General of Immigration,

together with two unmounted, unstamped and signed photographs of myself, accompany this application.

If you are the holder of a certificate of registry issued under the Act of March 2, 1929, give number of the certificate

Wlswel WargawerWlswel Wargawer

(Full signature of applicant as now used)

*A signature must be signed in presence of person before whom oath is taken.

16-4222



Wlswel Wargawer

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[fol. 253]

GOVERNMENT'S EXHIBIT 14

798974

Application for Certificate of Arrival of Alien

U. S. Immigration Service

No. 2/2137J

Office New York, N. Y.

Date March 4, 1932.

To Officer in Charge, Immigration Service, Philadelphia, Pa.

It is requested that you forward direct to the Bureau a certificate of arrival (Form 505) in the case of the alien concerning whom particulars are given below:

Name	Welwel	Warszower
	(First)	(Middle)

Plate of birth Kiev, Russia Date Sept. 3, 1893

Last arrived in the United States:

Port of arrival Philadelphia, Pa.

Date of arrival March 27, 1914.

☒ Shows Inspection Card
SIS. Haverford Manifest E#1

Name of Steamship	Haverford	Date O.K.
	(1st, 2d, or 3d class)	

Name under which admitted Welwel Warszower

Accompanying aliens None

Signature Edward Corsi, Officer in Charge. Commissioner of Immigration.

Note.—This form to be forwarded to the Bureau with Form 505. If entry can not be verified this form to be forwarded to Bureau with appropriate notation thereon.

[fol. 254]

GOVERNMENT'S EXHIBIT 15

(Photostat)

U. S. DEPARTMENT OF LABOR
BUREAU OF IMMIGRATION
WASHINGTON, D. C.

IMMIGRATION OFFICER IN CHARGE,
Barge Office, Battery, New York City.

Date March 16, 1932

EXHIBIT 15

U. S. Dist. Court

Reentry permits as listed below are issued for delivery to the aliens named thereon:

Page Number	Alien Number	Name of alien	FEB 15 1940	Signature of Officiating Officer	Date	Remarks
794594	798974	WILHELM WARSCHNER		<i>W. Warschner</i>	3-6-32	
794595	798985	KATATINA HEGAR		<i>K. Heger</i>	3-12-32	
794596	798984	DORIS LOUISE GILBERT		<i>D. Gilbert</i>	3-12-32	
794599	798979	ANNA MERTZ		<i>A. Mertz</i>	3-12-32	
794605	798989	TOROS KHOROSYAN		<i>T. Khorsyan</i>	3-12-32	
794604	798988	GERASIMUS KHOROSYAN		<i>G. Khorsyan</i>	3-12-32	
794606	798988	JOSUPE P. NIELA		<i>J. Niela</i>	3-12-32	
794608	800885	EMIL HEATHING		<i>E. Heathing</i>	3-12-32	
794609	798481	ALFRED KEARNEY		<i>A. Kearney</i>	3-12-32	
794610	800871	THEODORE CUNY		<i>T. Cuny</i>	3-12-32	
794611	800870	KARLA KUTLER		<i>K. Kutler</i>	3-12-32	
794612	800869	HEINZ SCHWANE		<i>H. Schwane</i>	3-12-32	
794613	800868	ANNE SCHWANE		<i>A. Schwane</i>	3-12-32	
794615	800867	MARY SCHWANE		<i>M. Schwane</i>	3-12-32	
794616	800866	PAULA HARM		<i>P. Harm</i>	3-12-32	
794617	798864	MARY JANE DALTON		<i>M. J. Dalton</i>	3-12-32	
794618	800801	JOSEF WELLS		<i>J. Wells</i>	3-12-32	
794619	800898	DOROTHY MARGARET ALLEN		<i>D. Allen</i>	3-12-32	
794620	800808	ANNA SCHMID		<i>A. Schmid</i>	3-12-32	
794621	800804	MARIA WELLS		<i>M. Wells</i>	3-12-32	
794622	800808	FRIDA SCHMID		<i>F. Schmid</i>	3-12-32	
794623	800806	HELEN ALLEN		<i>H. Allen</i>	3-12-32	
794624	800807	ELLA MEINER		<i>E. Meiner</i>	3-12-32	
794625	800808	JOHANN DUNKER		<i>J. Dunker</i>	3-12-32	
794626	800808	JOHANNA SCHNEIDER		<i>J. Schneider</i>	3-12-32	

No

298 MAR 17 1932

Consul General

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[fol. 255] GOVERNMENT'S EXHIBIT 16

This form is insufficient as a basis for a petition for
naturalization

New York 2/2137 J

Phila. 4374/592

Certificate of Admission of Alien

U. S. Department of Labor

Immigration Service

Port of Commissioner of Immigration,
Philadelphia Immigration Station,

Date Gloucester City, N. J.

March 8, 1932.

Commissioner General of Immigration, Washington, D. C.

I hereby certify that the following is a correct record
and statement of facts relative to the admission to the
United States of the alien named below:

- (1) Manifest No., E/1; Class, Third;
- (2) S. S., "Haverford"; Line, American;
- (3) Port at which admitted, Philadelphia, Pa.; Date,
March 27, 1914.;
- (4) Name, Welwel Warszower; Age 21; Sex, M;
- (5) Married, S; Occupation, Painter; Able to read, Yes;
Write, Yes;
- (6) Citizen of, Russia; Race, Hebrew;
- (7) Place of birth, Radanjenko, Russia.;
- (8) Class of immigration
visa, —; No. ; Issued at; Date, ;

[fol. 256] (9) Last permanent residence, Vikolsk, Cze-
ringow.;

(10) Name and complete address of nearest relative or friend in country whence alien came, Father—Schloime Warszower, Vikolsk, Russia.;

(11) Destination, Pittsburgh, Pa.; By whom Br. in law Money \$19.00 passage paid, ; brought, ;

(12) Whether in U. S. before, No; When, ; Where, ; Br. in

(13) Whether going to relative or friend, law; Give name and complete address: Nathan Geer, 313 Robert Str., Pittsburg-, Pa.;

(14) Purpose of coming to U. S., Permanent residence; Intended length of stay, —;

(15) Condition of health, Good;

(16) Height, 5'3½"; Complexion, Healthy; Color of hair, Brown;

(17) Color of eyes, Brown; Identification marks, None;

(18) Examined by Inspector Reiss;

(19) Accompanied by —; How admitted, Primary; for permanent residence;

(20) Remarks: —

MTG

J. L. Hughes (Signature), Ass't. Commissioner of Immigration, Phila. District. (Official title.)

[fol. 257]

GOVERNMENT'S EXHIBIT 17

(Front)

Penalty for Private Use to Avoid
Payment of Postage, \$300

U. S. Department of Labor, Bureau of Immigration,
Washington

Official Business

Return after Five Days

14-2375

Welwel Warszower
% Wm. Weiner
745 175th St., Apt. #3-C
Bronx, N. Y.

Mar. 19, 1932.

794594

3-16-32.

F. C. M.

[fol. 258]

(Reverse)

Form 105

Notification Card N. Y.

When writing concerning this case refer to No. → 798974

Department of Labor, Bureau of Immigration, Washington,
D. C.

This is to advise you that a return permit has been issued to you and has been mailed to the United States Immigration Office, which is located in the Barge Office, Battery, New York City. To obtain the permit it will be necessary for you to call in person at the office indicated and present this card. The office is open from 9 a. m. to 4.30 p. m., except Sundays and holidays.

Your attention is invited to Section 285 (e) of the Revenue Act of 1926, which reads as follows:

“No alien shall depart from the United States unless he first procures from the collector or agent in charge a certificate that he has complied with all the obligations imposed upon him by the income, war-profits, and excess-profits tax laws.”

Note.—It should be understood that a return permit does not insure the readmission to the United States of an alien who, because of illiteracy or other causes, is debarred from entry under the general immigration laws.

Very truly yours, Harry E. Hull, Commissioner General.

[fol. 259]

(Photostat)

[fol. 260]

GOVERNMENT'S EXHIBIT 18

(Photostat)

INSTRUCTIONS TO PASSENGERS

Fill out the reverse side of this card.

The senior member of a family may declare for all, providing the names and relationship of all are clearly stated in the space indicated.

TO RESIDENTS OF THE UNITED STATES:

All articles obtained abroad in any manner must be declared. This includes gifts, whether for self or others, used and worn articles, wearing apparel, jewelry, and other articles worn or carried on the person.

Commissions carried for others and articles intended for sale should be so described as they do not come within the \$100 exemption.

To obtain the \$100 exemption of personal articles accorded residents of the United States, the articles must be declared.

TO NONRESIDENTS:

Ordinary personal effects of nonresidents are free of duty. All other articles, including articles for sale or business use, gifts for others, household effects in use less than one year, and all articles intended for other persons, must be declared.

WHEN ALL YOUR BAGGAGE IS ASSEMBLED ON THE PIER PRESENT THIS DECLARATION IN YOUR TURN TO THE CUSTOMS INSPECTOR ASSIGNED TO YOUR SECTION.

FOR CUSTOMS OFFICER'S NOTATIONS ONLY			
CLASSIFICATION	VALUE	RATE	DUTY
<div style="position: absolute; top: 0; left: 0; transform: rotate(-90deg); transform-origin: left top;"> 5-1285a Customs (Date) </div> <div style="position: absolute; top: 50%; left: 50%; transform: translate(-50%, -50%); font-size: 2em;"> 22 11/00/01 </div>			

6/5 22 11/00/01

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8
TREASURY DEPARTMENT
Customs Form 6407-C, 10, Feb. 22-26

CUSTOMS DECLARATION—THIRD CLASS

S. S.

I, Nelvel Harzger, do declare
that I reside at 745 East 175th St.

Bronx
(City)

N. Y.
(State or Country)

that I am accompanied by the following members of my family:

whose effects are covered by this Declaration; that I have the following pieces of baggage:

TRUNKS	BOXES, ETC.	HAND PIECES	TOTAL
		2	2
ARTICLES TO DECLARE			CUSTOM VALUE

Gifts

\$15.00

18th
U. S. CUSTOMS
FEB 24 1937

I further declare that all the articles in my (or our) possession, obtained abroad, together with the cost or foreign value, are listed above.

Nelvel Harzger
Decl. before the Customs at New York

I further declare that all the articles in my (or our) possession that are intended for sale or for the use of others and all articles that are NOT strictly personal effects, together with the cost or foreign market value thereof, are listed above.

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[fol. 261]

GOVERNMENT'S EXHIBIT 19

A volume entitled "Register of Arrivals of Immigrants, No. 197 from March 7, 1914, to March 31, 1914. Office of United States Commissioner of Immigration, Phila. Pa."

A page of the volume reads as follows:

List or manifest of alien passengers for the United States Immigration Officer at Port of Arrival: S. S. Haverford, sailing from Liverpool, March 13, 1914, arriving at Port of Philadelphia, Pa. March 27, 1914.

1. No. on list: 1.
Head tax exemptions: head tax deposits: —
2. Name in full: Family name—Warszower, given name—Welwel.
3. Age: years, 21.
4. Sex: M.
5. Married or Single: S.
6. Calling or Occupation: Painter.
7. Able to read: Yes. Write: Yes.
8. Nationality. (Country of which citizen or subject) Russia.
9. Race or People: Hebrew.
10. Last permanent residence: County—Czernigow.
City or Town: Vikolsk.
11. Name and complete address of nearest relative or friend in country whence alien came: Father Schloime Warszower, Vikolsk, Russia.
12. Number on list: 1.
13. Final destination (intended future permanent residence): State: Pa. City or Town: Pittsburgh.
14. Whether having a ticket to such final destination: Yes.
15. By whom was passage paid: Br. in law.

[fol. 262] 16. Whether in possession of \$50 and if less, how much: \$19.

17. Whether ever before in the United States and if so when and where; yes or no: No.

18. Whether going to join a relative or friend; and if so what relative or friend, and his name and complete address: Bro. in law, Nathan Geer, 313 Robert Str. Pittsburgh, Pa.

19. Ever in prison or almshouse or institution for care and treatment of the insane or supported by charity? If so, which: No.

20. Whether a polygamist? No.

21. Whether an anarchist? No.

22. Whether coming by reason of any offer, solicitation, promise or agreement, expressed or implied, to labor in the United States: No.

23. Condition of health, mental and physical: Good.

24. Deformed or crippled; Nature, length of time and cause: No.

25. Height: ft. 5, inches 3½.

26. Complexion: Healthy.

27. Color of hair: Brown. Eyes: Brown.

28. Marks of identification: None.

29. Place of birth: Country—Russia. City or Town: Radanjenko.

On the same line as the entries concerning the defendant
4374

appears "Mar. 8 1932 — on 505 (R. P.)"

592

On the manifest, reverse side, the affidavit of the master of the S. S. Haverford is sworn to March 27, 1914, at Philadelphia, before Charles C. Reiss.

[fol. 263]

GOVERNMENT'S EXHIBIT 20

. This Exhibit is a carbon copy of Government's Exhibit 16.



[fol. 264]

GOVERNMENT'S EXHIBIT 21

(Photostat)

Form 1 **3086** REGISTRATION CARD No. **433**

4885 William Werner **24**
(Household name) (Family name)

2 Home address 194 Eastland Detroit
(No.) (Street) (City) (State)

3 Date of birth Sept 5 1893
(Month) (Day) (Year)

4 Are you (1) a natural-born citizen, (2) a naturalized citizen, (3) an alien, (4) or have you declared your intention (specify which)? Alien

5 Where were you born? Radomish Russia
(Town) (State) (Nation)

6 If not a citizen, of what country are you a citizen or subject? Russia

7 What is your present trade, occupation, or office? paper hanger

8 By whom employed? myself

Where employed? Detroit

9 Have you a father, mother, wife, child under 18, or a sister or brother under 18, wholly dependent on you for support (specify which)? no

10 Married or single (which)? single Race (specify which)? white

11 What military service have you had? Rank none branch none
 years none

12 Do you claim exemption from draft (specify grounds)?

Wm Werner
(Signature or mark)

It is unlawful to
 make a copy of this
 card

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A 27-1-8

REGISTRAR'S REPORT

1	Tall, medium, or short (specify which)?	5 ft 4"	Slender, medium, or stout (which)?	Medium
2	Color of eyes?	gray	Color of hair?	Blonde
3	Has person lost arm, leg, hand, foot, or both eyes, or is he otherwise disabled (specify)?	no		

I certify that my answers are true, that the person registered has read his own answers, that I have witnessed his signature, and that all of his answers of which I have knowledge are true, except as follows:

Harry Sterling
(Signature of Registrar)

Product 574
City or County Wayne
State Michigan

June 5
(Date of registration)

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CARDED FOR P.M.G.
April 16, 1948

~~SECRET~~

Name of Registrant: William Weiner Telephone No. _____
(Christian name.) (Surname.)
Address 420 Cameron St
(Street and number or R. F. D.)
City Detroit County Wayne State Mich

NAME JOHN W. WILKINSON

[illegible]

1. Questionnaire mailed 12-21-17

2. Questionnaire returned 1-2-18

3. Time extended to

4. Classification posted 1-17-18

5. Record forwarded to District Board

6. Record returned by District Board and reclassification posted

7. Record forwarded to President

8. Ordered to report for physical examination

9. Report of examining physician

10. Report of medical advisory board

11. Action of Local Board on physical examination

12. Physical examination forwarded to District Board on appeal

13. Reported for entrainment

14. Physical examination record returned by District Board

15. Date ordered to report for entrainment

16. Date reported to Adjutant General of State as delinquent

17. Date received at mobilization camp

18. Report of Adjutant General of Army as deserter

19. Transferred to Local Board for

20. Date of apprehension

21. Accepted at mobilization camp

22. Rejected at mobilization camp

23. Discharged

Qualified
Disqualified
Qualified for limited military service

Qualified
Disqualified
Qualified for limited military service

RECLASSIFICATION FOR CHANGE OF STATUS

[illegible]

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FILED
LOCAL BOARD DIVISION

QUESTIONNAIRE

Form 1001-P, 34, 61, G.

LOCAL BOARD DIVISION No. 6 DETROIT MUNICIPAL COURTS BLDG. (Stamp of Local Board.)	Serial No.	Name of Registrant	Telephone No.
	3066	William Weiner	
	Order No.	Address	City and State
	4885	420 Cameron Ave. Detroit, Mich.	Michigan

NOTE TO REGISTRANT.—You are required by law to return this card under 95-1 and in accordance with instructions contained hereon within 30 days from date of this notice. Failure to do so is a misdemeanor punishable by fine or imprisonment for one year and may result in the loss of valuable rights and in immediate induction into military service.

(Date) Dec 27-1917

Signature W. Weiner

CLAIM FOR EXEMPTION OR DEFERRED CLASSIFICATION

NOTE TO CLASSIFIER.—This form is to be used for claiming exemption or deferred classification by or in behalf of any registrant and for stating the grounds of claim. Place a cross (X) in Column A opposite the division that states the ground of claim. Searchers are required to consider only grounds that are stated by the registrant in Column A.

Column A.	Division	Column A.	Division
	CLASS I.		CLASS III—Continued.
	A. Male 21 years without dependent relatives.		A. Highly trained foreign or policeman, at least 3 years in service of municipality.
	B. Married man, with or without children, or father of motherless children, who has heretofore failed to support his family.	<input checked="" type="checkbox"/>	B. Necessary postmaster clerk.
	C. Married 1 year dependent on wife for support.		C. Necessary employee of United States in transmission of the mail.
	D. Married man, with or without children, or father of motherless children, who has heretofore earned, fully supported by income independent of his labor.		D. Necessary soldier or workman in U.S. army or abroad.
	E. Unable to earn income.		E. Necessary employee in service of United States.
	F. Unemployed by husband's labor.		F. Necessary contractor, operator, or kind manager of necessary agricultural enterprise.
	G. He is injured by or in respect of whom he is injured about "action in defense of the nation."		G. Necessary highly specialized technical or mechanical expert of necessary industrial enterprise.
	H. Registrant who fails to support his family and in respect of whom no deferred claim exists in relation to such.		H. Necessary operator or operator manager of necessary industrial enterprise.
	I. All registrants not included in any other division in this section.		
	CLASS II.	<input checked="" type="checkbox"/>	CLASS IV.
	A. Married man with children or father of motherless children, whose wife or child has or will receive no income from the labor of the wife, husband, and child, the support of the husband will not deprive such dependent of support.		A. Man whose wife or children are totally dependent on his labor for support.
	B. Married man, without children, whose wife, although the husband is engaged in a useful occupation, is not actually dependent on his labor for support, for the reason that she is capable of earning income from the labor of the wife, husband, and child, the support of the husband will not deprive such dependent of support.		B. Man who is actually employed in the service of others or himself in the United States.
	C. Necessary skilled farm laborer in necessary agricultural enterprise.		C. Necessary job mechanic, controlling, or directing head of necessary agricultural enterprise.
	D. Necessary skilled industrial laborer in necessary industrial enterprise.		D. Necessary job mechanic, controlling, or directing head of necessary industrial enterprise.
	CLASS III.	<input checked="" type="checkbox"/>	CLASS V.
	A. Man with dependent children (not his own), but toward whom he claims in relation of parent.		A. Officers—legislative, executive, or judicial of the United States or of State, Territory, or District of Columbia.
	B. Man with dependent aged or infirm parents.		B. Regular or duly ordained minister of religion.
	C. Man with dependent helpless brothers or sisters.		C. Student who on May 16, 1917, was preparing for military or nautical school.
	D. Country or municipal officer.		D. Person in military or naval service of United States.
			E. Alien enemy.
			F. Student alien (not an enemy) who claims exemption.
			G. Person totally and permanently physically or mentally unfit for military service.
			H. Person actually unfit to be a soldier of the United States.
			I. Licensed pilot actually employed in the pursuit of his vocation.
			Member of well-organized religious sect or organization, organized and existing on May 16, 1917, whose then existing creed or principles forbid its members to participate in war in any form and whose religious convictions are against war or participation therein.

REGISTRANT OR OTHER INTERESTED PERSON MUST ANSWER THE FOLLOWING QUESTION.

Q. Do you claim exemption or deferred classification in respect of the right named above? If so, state the divisions of each class and each class in which you claim the same.

Yes in Division A of Class IV, and Division E of Class V, and Division III of Class VI. (Date) Dec 31
(Signature) W. Weiner

WAIVER OF CLAIM FOR EXEMPTION OR DEFERRED CLASSIFICATION.

(To be signed by registrant or other interested person whenever a waiver is made.)

I hereby waive all claim of exemption or deferred classification of the registrant named above.

(Date of waiver.) _____ (Signature) _____

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IMPORTANT NOTICE TO REGISTRANTS AND OTHER INTERESTED PERSONS.

CAREFULLY READ, OR HAVE READ TO YOU, EVERYTHING ON THIS AND THE FOLLOWING PAGE BEFORE PROCEEDING FURTHER.

GENERAL RULES GOVERNING THE ANSWERING AND FILING OF THIS QUESTIONNAIRE.

Every registrant shall, immediately upon notice, proceed as follows:

1. He shall first carefully read the regulations and instructions printed on this and the next page of the Questionnaire, and also the rules and instructions printed in the Questionnaire with each series of questions.

2. He shall take up each series of questions, beginning with Series I, and answer all questions which he is required to answer, and in some cases required by the instructions.

3. He shall make no mark upon page 1, nor answer nor sign the question and waiver on page 1, until he has answered the twelve questions, but after having done so, and before he executes his affidavit at the end, he shall answer the question at the bottom of page 1, and sign his name thereto. If he wishes to waive such claim for exemption or deferred classification, he shall sign the waiver at the bottom of page 1.

4. He shall then, upon the first page of the Questionnaire, place a cross mark (X) in the space opposite the description of his status in relation to every person, matter, thing, and circumstance which constitutes the ground or basis for exemption or discharge. The mark is not limited to making one cross mark (X) indicating his status as to exemption or deferred classification, but may make a cross mark in each of the twelve spaces to indicate his status in relation to every ground for exemption or deferred classification which exists in his case.

5. He shall then swear or affirm to the truth of his answers by executing the "Registrant's Affidavit" at the end (page 18).

6. The Questionnaire contains twelve series of questions.

7. Every registrant must answer all the "General Questions" under Series I, and questions as to his "Physical Status" under Series II, and as many more of the questions under Series III as, under the specific instructions relating to Series II, may be applicable to his case. He must then answer the first question of each of the other series, from Series III to Series XII, inclusive. His answer to each question of each of said series shall be either "Yes" or "No" as the fact may be. His answer to the first question in each of Series III to XII, inclusive, will determine (as indicated by the specific instructions to each separate series of questions) whether he need answer any or all of the remaining questions of said series.

8. Supporting affidavits of other persons must be received by every registrant who claims exemption or deferred classification in the following classes of cases: Divinity students (Series VI); persons having dependent relatives (Series XI); persons necessarily engaged in essential industrial enterprises (Series XII); and persons engaged in essential agricultural enterprises (Series XIII). Upon failure to receive supporting affidavits, his claim will not be considered either by the Local Board or the District Board.

9. The Questionnaire, answered and sworn to in strict accordance with these rules and regulations, must be filed with the Local Board on or before the seventh day (excluding Sundays and legal holidays) after the date upon the first page of the Questionnaire.

10. The term "deferred class" includes the second, third, fourth, and fifth classes of the five classes into which registrants shall be placed. Registrants placed in Class V have been exempted or discharged, and all registrants placed in Classes II, III, and IV have been temporarily discharged; all classifications being conditional upon the continuing existence of the status of the registrant which is the basis of his classification.

Section 78. Reasons for and effect of classification. * * *

The group of registrants within the jurisdiction of each Local Board is taken as the unit to be classified. Within each class the order of classification is determined by the drawing, which has hitherto been done to every man an order of availability for military service relative to his permanent or temporary exemption or discharge. The effect of classification in Class I is to render every man so classified permanently liable to military service in the order determined by the national drawing. The effect of classification in Class II is to grant a temporary discharge from draft, effective until Class I in the jurisdiction of the same Local Board is exhausted. The effect of classification in Class III is to grant a temporary discharge from draft, effective until Classes I and II in the jurisdiction of the same Local Board are exhausted; and, similarly, Class IV becomes liable only when Classes I, II, and III are exhausted. The effect of classification in Class V is to grant exemption or discharge from draft. The term "deferred classification" as used in these regulations is equivalent to the term "temporary discharge."

NOTICE TO REGISTRANTS.

Section 7. Notice to registrants and to all interested persons and effect of such notice.

1. The process of examination and selection of registrants, under these rules and regulations, shall begin by the posting of notice in the office of the Local Board on Form 1002, and by mailing a Questionnaire (Form 1001) to every registrant included within such notice, as provided in Section 22 hereof; and notice of every subsequent action taken by either the Local or District Board in respect of such registrant shall be given by entering a minute or date of such action on the Classification List (Form 1003) in the office of the Local Board, and in addition to such entries, by mailing to the registrant (and in some cases to other claimants) a notice of such action.

2. Whenever a duty is to be performed or a period of time begins to run within which any duty is to be performed by any such person, or within which any right or privilege may be claimed or exercised by or in respect of any such registrant, a notice of the duty in which such duty is to be performed, or such time begins to run, shall be mailed to the registrant, and the date of such mailing shall be entered opposite the name of such registrant on the Classification List (Form 1003), which is always open to inspection by the public at the office of the Local Board.

3. In addition to the mailing of such notice to registrants, notice of the disposition of claims of other persons in respect of registration shall be mailed to such other persons.

4. Either the mailing or the entry of such date in the Classification List shall constitute the giving of notice to the registrant and to all concerned, and shall charge the registrant and all concerned with notice of the day upon which such duty is to be performed, or the beginning of the running of the time within which such duty must be performed, or such right or privilege may be claimed, regardless of whether or not a mailed notice or Questionnaire is actually received by the registrant or other person.

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(e) Failure by any registrant to perform any duty prescribed by the Selective Service Law or by these Rules and Regulations, at or within the time required, is a misdemeanor punishable by imprisonment for one year, and may result in loss of valuable rights and immediate induction of such registrant into military service.

(f) Failure of the registrant or any other person concerned to claim and exercise any right or privilege on the day or within the time authorized by these Rules and Regulations shall be considered a waiver of such right or privilege, and shall foreclose such person from thereafter claiming the same, subject only to the privilege granted by these Rules and Regulations to apply for an extension of time.

(g) All registrants and other persons are required and strictly enjoined to examine from time to time said notice, Form 1002, as posted by the Local Board, and the Classification List (Form 1000) upon which said dates are to be entered, in order to be informed of the time for the performance of any duty or the exercise of any right or privilege; and it is the duty of every registrant concerning whom any notice is posted, but who for some reason has not received the Questionnaire or notice, as the case may be, to apply to his Local Board for a copy thereof. Failure to receive notice or Questionnaire will not excuse the registrant from performing any duty within the time limit, nor shall it be in itself ground for extension of time.

FAILURE TO RETURN QUESTIONNAIRE.

Sec. 129. Registrants who fail to return Questionnaires to be placed in Class I.

Any registrant, except an alien enemy, who fails to return the Questionnaire on the date required shall be deemed to have waived all claim for deferred classification, shall stand classified in Class I; and be so recorded by the Local Board subject, however, to the rights and privileges of other persons to apply to the Local Board for deferred classification of the registrant, and to the right of the registrant or any other person to apply for an extension of time, as provided in section 99.

OATHS.

Section 10. By whom oaths may be administered.

Any oath required by these Rules and Regulations (except oaths to persons called before Local or District Boards to give oral testimony) may be administered—

- (1) By any Federal or State officer authorized by law to administer oaths generally;
- (2) By any member of any Local or District Board having jurisdiction of the registrant;
- (3) By any Government Agent in regard to any case pending before any Local or District Board with which he is connected;
- (4) By any person designated to act in the capacity of legal aid or advisor to registrants; and
- (5) By any postmaster within the same local jurisdiction as the registrant.

Any member of any local or district board may administer oaths to any persons called before such board for oral examination in regard to facts and matters relating to a case pending before it.

When the oath or oaths are administered by any of the persons named in classes 2, 3, 4, and 5 hereof there shall be no fee or charge for the same.

AID AND ADVICE TO REGISTRANTS.

Section 44. Legal Advisory Boards.

There have been provided in the various counties, cities, and other localities throughout the United States Legal Advisory Boards, composed of disinterested lawyers and laymen, to be present at all times during which Local Boards are open for the transaction of business, either at the headquarters of Local Boards or at some other convenient place or places, for the purpose of advising registrants of the true meaning and intent of the Selective Service Law and of these regulations, and of assisting registrants to make full and truthful answers to the Questionnaire and to aid generally in the just administration of said Law and Regulations.

CHANGE OF STATUS.

Section 116. Registrants to report change of status.

Every registrant shall, within five days after the happening thereof, report to his Local Board any fact which might change or affect his classification.

Failure to report change of status as herein required, or making a false report thereof, is a misdemeanor punishable by one year's imprisonment.

REVOCATION.

Section 4. Revocation of exemption and discharge.

All exemptions and discharges made prior to the date of these Rules and Regulations, and all certificates in evidence thereof, are hereby revoked, and all such certificates hereafter issued shall have no further validity.

In any case of deferred classification made under these Rules and Regulations the Secretary of War may order such deferred classification, and any certificate issued in evidence thereof, to be revoked and rescinded, and the registrant to be transferred to any less deferred class designated by the Secretary; except only as to such Registrants as have been placed in Class Von account of legal exemption.

NOTE.—THE INITIALS S. S. R. (SELECTIVE SERVICE REGULATIONS) REFER TO THE PRESIDENTIAL RULES AND REGULATIONS.

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QUESTIONS.

SERIES I. GENERAL QUESTIONS.

INSTRUCTIONS.—Every registrant must answer ALL the following questions, and show his name at the bottom.

Q 1. State (a) your full name and your present age, occupation, and residence; and (b) the name, address, and relationship of your nearest relative.

A. 1. (a) William Weiner 24 Long worker Detroit
(Name of registrant.) (Age) (Occupation) (Address)
(b) Ester Weiner 420 Cameron ave Wife
(Name of relative.) (Address of relative.) (Relationship)

Q 2. If you are employed, give your employer's name and address? A. 2. Park & Leavins Co

Q 3. Give below all the occupations at which you have worked during the last 10 years, including your occupation on May 18, 1917, and since that date, and the length of time you have served in each occupation:

A. 3.	<u>Paper Hanger</u> (Occupation.)	<u>2</u> (Months)	<u>2</u> (Years)
	<u>Drug Maker</u> (Occupation.)	<u>1</u> (Months)	<u>1</u> (Years)
	<u></u> (Occupation.)	<u></u> (Months)	<u></u> (Years)
	<u></u> (Occupation.)	<u></u> (Months)	<u></u> (Years)

Q 4. How many hours per week have you worked in the occupation or occupations above named during the period since May 18, 1917? A. 4. 47

Q 5. In what occupation do you consider yourself most proficient? A. 5. Paper Hanger

Q 6. Would you be willing to take free evening school instructions, fitting you for service in some occupation in the Army before you are called to camp? A. 6. No
(To be "yes" or "no")

Q 7. Mention any previous military experience you have had, giving organization, rank, and length of service. A. 7. no

Q 8. Underline the branch of the Army in which you prefer to serve if selected: Artillery—Aviation—Engineer Corps—Infantry—Medical Department—Ordnance Department—Quartermaster Corps.

Q 9. Schooling: none
Grade reached in school _____ Years in high school _____ Years in college _____

Name of college and subjects of specialization _____

Years in technical school _____ Name of school and course pursued _____

Underline the languages you speak well: English—French—German.

State any other languages you speak Hebrew Russian

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10. In the columns below draw one line under those occupations at which you have worked; draw two lines under those at which you are expert. After each underlined occupation write also the number of years (0, 1, 2, 3, 4, 5) of experience you have had in that occupation.

Years	Years	Years
1. Automobile driver	26. Factory worker	27. Printer
2. Agent, salesman and collector	27. Farmer	28. Quarryman
3. Allowance and collection	28. Farmer	29. Railroad man
(a) Driver	29. Fire fighter	(a) Construction
(b) Engineer	30. Fire ranger	(b) Operation
(c) Inspection	31. Foundry man	(c) Maintenance
(d) Marine engineer	(a) Core maker and mold	(d) Repair
4. Art and water truck driver	(b) Pattern man	32. Railway policeman
5. Clerk	32. Grover	33. Sapper
6. Distribution	33. Guard	(a) Bridge
7. Editor	34. Gunsmith	(b) Building
8. Electrician	35. Harrow maker	(c) Ship
(a) Farmer	36. Houseman	34. Shipman
(b) Farmer	37. Illegible	35. Steamfitter
9. Engineer	38. Laborer	36. Scaffolding
10. Electrician	39. Lawyer	37. Seaman
11. Bricklayer	40. Librarian	38. Sewing machine
12. Carpenter	(a) Telegraph	39. Shoring man
13. Carpenter	(b) Telephone	40. Sheet-metal worker
14. Carpenter	41. Larksmith	(a) Copper
(a) Builder	42. Longshoreman	(b) Iron
(b) Construction	43. Lumberman	(c) Tin
(c) Ship	44. Machine	41. Shipbuilder
(d) Ship	(a) First person	42. Shipmaster
15. General industry worker	(b) General services	43. Shipman
16. General worker	(c) Grinding machine	44. Shipowner
17. General worker	(d) Lath	45. Shipowner
18. General worker	(e) Miller and planer	(a) Marine
19. General worker	(f) Tool maker	(b) Machinery
20. General worker	46. Millman	46. Shipowner
21. General worker	47. Millwright	47. Shipowner
22. General worker	48. Miner	48. Shipowner
23. General worker	(a) Tugboat and landing	49. Shipowner
24. General worker	(b) Dock	50. Shipowner
25. General worker	(c) Exploiter	51. Shipowner
26. General worker	(d) Tugboat	52. Shipowner
27. General worker	(e) Truck laying	53. Shipowner
28. General worker	49. Navigation expert	54. Shipowner
29. General worker	50. Nurse	55. Shipowner
30. General worker	51. Painter	56. Shipowner
31. General worker	(a) House	57. Shipowner
32. General worker	(b) Sign	58. Shipowner
33. General worker	(c) Sign	59. Shipowner
34. General worker	52. Pattern maker	60. Shipowner
35. General worker	53. Physician	61. Shipowner
36. General worker	54. Plumber	62. Shipowner
37. General worker	55. Plumbing trade	63. Shipowner
38. General worker	56. Policeman	64. Shipowner
39. General worker		65. Shipowner
40. General worker		66. Shipowner
41. General worker		67. Shipowner
42. General worker		68. Shipowner
43. General worker		69. Shipowner
44. General worker		70. Shipowner
45. General worker		71. Shipowner
46. General worker		72. Shipowner
47. General worker		73. Shipowner
48. General worker		74. Shipowner
49. General worker		75. Shipowner
50. General worker		76. Shipowner
51. General worker		77. Shipowner
52. General worker		78. Shipowner
53. General worker		79. Shipowner
54. General worker		80. Shipowner
55. General worker		81. Shipowner
56. General worker		82. Shipowner
57. General worker		83. Shipowner
58. General worker		84. Shipowner
59. General worker		85. Shipowner
60. General worker		86. Shipowner
61. General worker		87. Shipowner
62. General worker		88. Shipowner
63. General worker		89. Shipowner
64. General worker		90. Shipowner
65. General worker		91. Shipowner
66. General worker		92. Shipowner
67. General worker		93. Shipowner
68. General worker		94. Shipowner
69. General worker		95. Shipowner
70. General worker		96. Shipowner
71. General worker		97. Shipowner
72. General worker		98. Shipowner
73. General worker		99. Shipowner
74. General worker		100. Shipowner

Paper Hanger 2
Factory Lumber 1
Worker

11. If you are an expert in any occupation not mentioned in these columns, write it here.

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- Q. 12. Have you ever been convicted of a crime? A. 12. no
- Q. 13. If your preceding answer is "yes," state (a) the name of the crime; (b) the approximate date of conviction; (c) the name of the court? A. 13. (a) no
(b) no (c) no
- Q. 14. Are you now confined in prison or reformatory, either (a) serving sentence or (b) awaiting trial?
A. 14. (a) no (b) no
- Q. 15. Are you on bail under any criminal process? If so, state full details. A. 15. no

John J. Warner
(Signature of registrant.)

IMPORTANT NOTE.—If the registrant is an inmate of an institution mentioned in question 14 and is unable to answer the foregoing questions, the executive head of the institution is requested to communicate the information immediately to the Local Board.

SERIES II. PHYSICAL FITNESS.

the foregoing questions, the executive head of the institution is requested to communicate the information immediately to the Local Board.

SERIES III. LEGISLATIVE, EXECUTIVE, AND JUDICIAL OFFICERS.

INSTRUCTIONS.—Every registrant must answer the first question. If he answers "no," he need not answer the remaining questions or sign his name. If he answers "yes," he must answer ALL the questions, and sign his name.

- Q. 1. Are you a Federal or State legislative, executive, or judicial officer. A. 1. no
(To be "yes" or "no.")
If your answer is "no" do not answer any other questions and do not sign your name.
- Q. 2. State exact designation of your office? A. 2. _____
- Q. 3. State (a) when you entered upon said duties, and (b) when you will cease to occupy said office.
A. 3. (a) _____ (b) _____

NOTE.—See Sec. 75, U. S. R.

(Signature of registrant.)

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SERIES IV. MINISTERS OF RELIGION.

INSTRUCTIONS. Every registrant must answer the first question. If he answers "no" he need not answer the remaining questions, or sign his name. If he answers "yes" he must answer ALL the questions, and must sign his name.

1. Are you a regular or a duly ordained minister of religion; and if so, of what sect or organization?

1. Yes
(To be "yes" or "no," and if "yes" add name of sect.)

If your answer is "no" do not answer any other questions and do not sign your name.

2. State (a) the manner by which, (b) the date when, and (c) the place where you became such minister.

2. (a) _____ (b) _____ (c) _____

3. State place and _____ of your religious labors: (a) On June 5, 1917; (b) Now.

3. (a) _____ (b) _____

4. Do you follow any additional occupation? If so, what? A. 4. _____

NOTE. See Sec. 29 S. S. B.

(Signature of registrant.)

SERIES V. DIVINITY STUDENTS.

INSTRUCTIONS. Every registrant must answer the first question. If he answers "no," he need not answer the remaining questions, or sign his name. If he answers "yes," he must answer ALL the remaining questions, and sign his name and must also secure the supporting affidavit of the president or other executive head of the school. If such officer be not available, the executive nearest in rank may make the affidavit, but must embody in it the facts concerning the nonavailability of the superior.

1. Were you on May 18, 1917, a student preparing for the ministry? A. 1. No
(To be "yes" or "no.")

If your answer is "no" do not answer any other questions and do not sign your name.

2. State the name and location of such school. A. 2. _____

3. Give names and locations of all divinity schools you have attended with dates of attendance.

3. _____

4. Is any school mentioned by you wholly or partially a correspondence school? A. 4. _____
(To be "yes" or "no.")

5. Have you ceased to be a student of divinity, and if so, what is your occupation? A. 5. _____

NOTE. See Sec. 29 S. S. B.

(Signature of registrant.)

SUPPORTING AFFIDAVIT.

STATE OF _____

County of _____, ss:

I, _____, do solemnly swear that I was on the 18th day of _____
(Name of affiant.)

av. 1917, _____ of the school mentioned in the answer to
(Designation of affiant's office in school.)

the foregoing question No. 2, and that I know of my own personal knowledge that the answers to the foregoing questions Nos. 1 and 2 are true, and that so much of answer 4 as relates to the school mentioned in answer 2

is true. I further state that _____ who was _____
(If payable to superior officer.) (Designation of superior officer.)

said school on May 18, 1917, is now _____
(State reason why superior officer is not available if that be the fact.)

(Signature of supporting affiant.)

Subscribed and sworn to before me this _____ day of _____, 191

(Signature of officer.)

(Designation of officer.)

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SERIES VI. MILITARY OR NAVAL SERVICE.

INSTRUCTIONS.—Every registrant must answer the first question. If he answers "no," he need not answer the other questions or sign his name. If he answers "yes," he must answer ALL the other questions FULLY and must sign his name.

- Q. 1. Are you in any branch of the military or naval service of the United States? A. 1. no
(To be "yes" or "no.")
- If your answer is "no," do not answer any other questions and do not sign your name.
- Q. 2. Give your (a) rank, (b) organization or corps, (c) branch of the service, and (d) mail address.
A. 2. (a) _____ (b) _____ (c) _____ (d) _____
- Q. 3. State the (a) date, (b) place, and (c) manner you entered the service. A. 3. (a) _____
(b) _____ (c) _____

(NOTE.—See Sec. 79, S. S. R.)

Signature of registrant.

SERIES VII. CITIZENSHIP.

INSTRUCTIONS.—Every registrant must answer the first question. If he answers "yes," he need not answer the remaining questions or sign his name. If he answers "no," he must then answer the second question. If he answers the second question "no," then he need not answer the remaining questions, but must sign his name. If he answers the second question "yes," he must answer ALL the remaining questions and must sign his name.

- Q. 1. Are you a citizen of the United States? A. 1. no
(To be answered "yes" or "no.")

If your answer is "yes," do not answer any other questions and do not sign your name.

- Q. 2. Do you claim exemption from military service because you are not a citizen? A. 2. yes
(To be "yes" or "no.")

If you answer "no" to Q. 2, sign your name at bottom and do not answer other questions.
If you answer "yes" to Q. 2, you must answer all questions and sign your name.

- Q. 3. Where and on what date were you born? A. 3. Quasig Sep 5 - 1893
- Q. 4. On what date and place did you arrive in this country? A. 4. March 21 - 1914 Philadelphia
- Q. 5. By what vessel or other means did you enter this country? A. 5. S.S. Havensford
- Q. 6. From what place did you come? A. 6. Liverpool Eng.
- Q. 7. Did you come to this country with your parents? A. 7. no
(State whether you came with both, and if not with both, which.)
- Q. 8. Has either of your parents been naturalized in the United States? A. 8. no
(If "yes," when and where?)
- Q. 9. Have you ever voted or registered for voting anywhere in the United States; if so, where? A. 9. no
(If "yes," when and where?)
- Q. 10. Have you ever taken out first papers; if so, when and where? A. 10. no
- Q. 11. Are you willing to return to your native country and enter its military service? A. 11. yes
(To be "yes" or "no.")

NOTE.—See Sec. 79, S. S. R.

Signature of registrant.

SERIES VIII. OFFICIALS, FEDERAL EMPLOYEES, PILOTS, AND MARINERS.

INSTRUCTIONS.—Every registrant must answer the first question. If he answers "no," he need not answer the remaining questions, nor sign his name. If he answers "yes," he must answer ALL the questions and sign his name. If he is a customhouse clerk, or is employed by the United States in any of the capacities mentioned in question 1, he must also secure and file with the Local Board an affidavit signed and sworn to by the official of the Government having direct supervision and control of the department or branch of the Government in which he is employed, stating that he is necessary to the adequate and effective operation of such department or branch of the Government and can not be replaced by another person without substantial, material loss to the adequate and effective operation thereof. In addition to said affidavit he must also secure, and file with the Local Board a certificate of approval of said affidavit by the head of the department under which he is employed, or of such other official as may be designated by the President. (See Part XII, S. S. R.)

- Q. 1. Are you a county or municipal official, or a customhouse clerk, or are you employed by the United States in the transmission of the mail, or are you an artificer or workman employed in a United States armory, arsenal, or navy yard, or do you belong to any class of employees of the United States which have been designated by the President as eligible for discharge, or are you a pilot, or are you a mariner actually employed in the sea service of a citizen or merchant within the United States? A. no
(To be "yes" or "no.")
- If your answer is "no," do not answer any other questions and do not sign your name.

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- Q. 2. State the designation of your office, position, or occupation. A. 2. _____
- Q. 3. Were you elected or appointed? State which. A. 3. _____
- Q. 4. State the exact place of the performance of your duties. A. 4. _____
- Q. 5. State how long you have held such position, or have been so employed. A. 5. _____
- Q. 6. State the character and duration of your education, training, and experience for your position.
A. 6. _____
- Q. 7. State the nature of your work. A. 7. _____
- Q. 8. How many persons of the same or similar grade are in the establishment where you are employed?
A. 8. _____

NOTE. See Sec. 179 and Part XII, S. S. R.

(Signature of registrant.)

SERIES IX. RELIGIOUS CONVICTION AGAINST WAR.

INSTRUCTIONS.—Every registrant must answer the first question. If he answers "no," he need not answer the other questions, or sign his name. If he answers "yes," he must answer ALL the questions, and sign his name.

- Q. 1. Are you a member of a religious sect or organization whose creed forbids you to participate in war in any form? If so, state the name of the sect and the location of its governing body or head.

A. 1. no

If your answer is "no," do not answer any other questions and do not sign your name.

- Q. 2. State the date and place of organization of your local church. A. 2. _____
- Q. 3. State number of adherents of such sect in the United States. A. 3. _____
- Q. 4. When did said sect adopt opposition to war as a part of its creed? A. 4. _____
- Q. 5. When, where, and how did you become a member of such sect? A. 5. _____
- Q. 6. Give the name and location of the particular local congregation of which you are a member.
A. 6. _____

NOTE.—See Sec. 79, S. S. R.

(Signature of registrant.)

SERIES X. DEPENDENCY.

INSTRUCTIONS.—Every registrant must answer the first question. If he answers "no," he need not answer the remaining questions or sign his name. If he answers "yes," he must answer all the questions and sign his name. If he intends to claim discharge from military service on account of having dependents, or if he expects any person to claim discharge for him on such ground, he must secure the supporting affidavits annexed hereto of every person over 18 years of age named as dependents. He or any other person may also (and if the local Board requires it, he or they must) file with the local Board additional affidavits, which must be legibly written or typewritten on one side of white paper of approximate size and shape of this sheet.

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SERIES XI. INDUSTRIAL OCCUPATION.

INSTRUCTIONS.—Every registrant must answer the first question. If he answers "yes," he must answer all the remaining questions, except as stated in the interlined instructions, and must sign his name at the end. If the registrant claims deferred classification on account of engagement in industry, he must secure the two supporting affidavits annexed at the end of Series XII, of two persons, in conformity with the following rules:

1. If the registrant is an employee, affidavit No. 1 must be made by his immediate superior, and affidavit No. 2 by the executive head of the enterprise. If the registrant's immediate superior is also executive head of the enterprise, affidavit No. 1 shall be made by such executive, and affidavit No. 2 need not be executed.

2. If the registrant is in business for himself, the two affidavits must be made according to the following rules: (a) If he is a copartner, affidavit No. 1 must be made by a copartner and affidavit No. 2 by a near neighbor. (b) If he is in business as an individual, both affidavits must be made by two near neighbors.

ALL AFFIDAVITS AND OTHER PROOF in support of claims for deferred classification on industrial grounds **MUST BE FILED WITH THE LOCAL BOARD**, except such proof as the District Board may directly require; and all affidavits and other written proof must be legibly written or typewritten on one side only of white paper of the approximate size of this sheet.

Q. 1. Are you engaged in an industrial enterprise necessary (1) to the maintenance of the military establishment, or (2) to the effective operation of the military forces, or (3) to the maintenance of the National interests during the emergency? A. 1. Yes

(To be "yes" or "no.")

If your answer is "no" do not answer any other questions and do not sign your name.

Q. 2. Are you an employee, or in business for yourself? A. 2. _____

Q. 3. Do you claim deferred classification on the ground that you are engaged in such enterprise? _____

A. 3. _____

(Yes or no.)

4. State the nature of the enterprise. A. 4. _____

5. State the name under which the enterprise is conducted, and its exact location (post-office address). _____

Q. 6. What is produced by said enterprise? A. 6. _____

Q. 7. Do you give all your working time to said enterprise? A. 7. _____

(Yes or no.)

Q. 8. If not, what do you do? A. 8. _____

Q. 9. What trade name is applied to your job (for instance, "laborer," "skilled laborer," "foreman," "manager," etc.)? A. 9. _____

Q. 10. State generally what duties you perform. A. 10. _____

Q. 11. How long have you been engaged in the work you are now doing? A. 11. _____

Q. 12. State your education, training, and experience for the work you are now doing. A. 12. _____

Q. 13. State the reasons why you can not be easily replaced by another person. A. 13. _____

The following questions are to be answered only by a registrant who is an employee.

Q. 14. How many persons are employed in the plant where you work? A. 14. _____

Q. 15. How many persons are employed in the same kind of work in your plant? A. 15. _____

The following questions are to be answered only by a registrant who is in business for himself.

Q. 16. What are your earnings per day, per week, or per month? A. 16. _____

Q. 17. State whether you are in business as an individual or a copartner. A. 17. _____

Q. 18. How much capital have you invested in said enterprise? A. 18. _____

Q. 19. How long have you been engaged in said enterprise? A. 19. _____

Is said enterprise a solvent, prosperous, and going concern? A. 20. _____

What were your net earnings from said business during the past twelve months? A. 21. \$ _____

How many persons are in your employ? A. 22. _____

Q. 23. If you have any person related to you by blood, marriage, or contract, who is in any way assisting or can assist in the management of the enterprise, give his name and address, and state why he can not take your place during your absence. A. 23. _____

(Signature of registrant.)

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SERIES XII. AGRICULTURAL OCCUPATION.

INSTRUCTIONS. Every registrant must answer the first question. If he answers "yes," he must answer ALL the remaining questions, except as stated in the interlined instructions, and must sign his name. If the registrant claims deferred classification on the ground of engagement in agriculture, he must secure the two affidavits at the end of this series of questions, of two persons, in conformity with the following rules:

1. If the registrant is an employee, affidavit No. 1 must be made by his employer and affidavit No. 2 by a near neighbor.
2. If the registrant is the sole managing, controlling, and directing head of the agricultural enterprise, the two supporting affidavits must be made according to the following rules: (a) If such head of the agricultural enterprise is the owner of the land, both affidavits shall be made by near neighbors. (b) If such head of the agricultural enterprise owns the land, affidavit No. 1 must be made by the owner of the land, or the latter's agent, and affidavit No. 2 by a near neighbor.

ALL AFFIDAVITS AND OTHER PROOF in support of claims for deferred classification on agricultural grounds MUST BE FILED WITH THE LOCAL BOARD, except such proof as the District Board may directly require; and all additional affidavits and other written proof must be legibly written or typewritten on one side only of white paper of the approximate size of this sheet.

Q. 1. Are you engaged in an agricultural enterprise? A. 1. no
(To be "yes" or "no")

If your answer is "no" do not answer any other questions and do not sign your name.

Q. 2. Are you an employee, or the owning and managing head of the enterprise? A. 2. _____

Q. 3. Do you claim deferred classification on the ground that you are engaged in such enterprise?

A. 3. _____
(To be "yes" or "no.")

Q. 4. State the kind of farm. A. 4. _____

Q. 5. Are you engaged in all branches of work on the farm? A. 5. _____
(To be "yes" or "no.")

Q. 6. If you answer "no" state what branch of work you are engaged in. A. 6. _____

Q. 7. State in general terms (not as to quantity) (a) What is produced by the entire agricultural enterprise and (b) What is produced by that branch of the farm in which you work.

A. 7. (a) _____ (b) _____

Q. 8. Name post office of the farm. A. 8. _____

Q. 9. Do you give all your working time to the farm? A. 9. _____
(Yes or no.)

Q. 10. If not, what other work do you do? A. 10. _____

Q. 11. What is the name of your job on the farm (for instance, "overser," "manager," "foreman," "laborer," etc.)? A. 11. _____

Q. 12. What do you do on the farm? A. 12. _____

Q. 13. State (a) how long you have been working at farming, and (b) how long you have worked on the farm where you are now working.

A. 13. (a) _____ (b) _____

Q. 14. State the nature and extent of your education and training as a farmer. A. 14. _____

Q. 15. How many persons are engaged both as owners and workers on the same farm with yourself?

A. 15. _____

Q. 16. State the following facts concerning the particular farm on which you work; (a) the number of acres of the land; (b) the number of acres under cultivation at the present time; (c) the kinds of crops raised in the last year or now being raised; (d) what use is made of the land not cultivated?

A. 16. (a) _____ (b) _____ (c) _____ (d) _____

Q. 17. State the number and kind of live stock on the land.

A. 17. _____

Q. 18. State (a) how many persons live on the land and (b) how many of them actually work on the farm.

A. 18. (a) _____ (b) _____

Q. 19. State in terms of money value, how much the products of said farm exceed the amount consumed by all persons working on it, and their families. A. 19. \$ _____

Q. 20. State the approximate cost of production, including labor, fertilizers, etc. A. 20. \$ _____

Q. 21. State why you can not be easily replaced by another person.

A. 21. _____

BLANK PAGE

Q. 22. State fully the actual condition which would result from your removal.

A. 22. _____

Q. 23. If you have any person related to you by blood, marriage, or contract who is in any way assisting, or can assist you, state why he can not take your place.

A. 23. _____

The following questions are to be answered only by a registrant who is an employee:

Q. 24. By whom are you employed? A. 24. _____

Q. 25. What are your earnings, in money value, as an employee on said farm, whether in money or produce or both, per day, per week, or per month, as the case may be? A. 25. \$ _____

The following questions to be answered only by a registrant who is head and owner of a farm.

Q. 26. Are you the sole managing head and owner of the farm? A. 26. _____

Q. 27. Do you own the land? A. 27. _____
("Yes" or "No.")

Q. 28. What is its value? A. 28. \$ _____

Q. 29. How long have you owned it? A. 29. \$ _____

Q. 30. State value of personal property owned and used by you on the farm. A. 30. \$ _____

Q. 31. If you lease the land (a) upon what terms; (b) name and address of owner, and (c) when present lease expires.

A. 31. (a) _____ (b) _____ (c) _____

Q. 32. State (a) how many persons are in your employ and (b) the total you have paid during the past year to all of said employees, whether in money or in produce.

A. 32. (a) _____ (b) _____

Note.—See Sections 80 to 85, inclusive, R. S. B.

(Signature of registrant.)

AFFIDAVITS TO BE USED IN SUPPORT OF EITHER INDUSTRIAL OR AGRICULTURAL CLAIMS.

SUPPORTING AFFIDAVIT No. 1.

STATE OF _____,

County of _____, ss:

I, _____, do solemnly swear—affirm—that I reside _____
(Name of affiant.) (Home or the other.) (State district.)

from _____, the registrant herein named; that my occupation is _____,
(Name of registrant.)

that I have read the foregoing questions Nos. _____ to _____, inclusive; that I occupy the following position in the enterprise mentioned in said answers, namely, _____
(Insert here either affiant's position in said enterprise or the word "none," as the case may be.)

that I occupy the following relationship toward said registrant in said enterprise, namely, _____
(Insert here in what respect affiant is registrant's superior, or the word "none," as the case may be.)

that I know of my own knowledge that the answers to questions Nos. _____
(Insert here question numbers in figures.)

are true; that I am reliably and fully informed and believe that the answers to questions Nos. _____
(Insert here question numbers in figures.)

are true; and that my relationship by blood or marriage to said registrant is _____
(Insert here either relationship or "none," as the case may be.)

(Signature of affiant.)

Subscribed and sworn to before me this _____ day of _____, 1917.

(Signature of officer.)

(Designation of officer.)

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SUPPORTING AFFIDAVIT No. 2.

STATE OF

County of, ss:

I, do solemnly swear—affirm—that I reside
(Name of affiant.) (Erase one or the other.) (State district.)from the registrant herein named; that my occupation is
(Name of registrant.)

that I have read the foregoing questions Nos. to, inclusive; that I occupy the following position

in the enterprises mentioned in said answers, namely,
(Insert here either affiant's position in said enterprise, or the word "none," as the case may be.)that I occupy the following relationship toward said registrant in said enterprise, namely,
(Insert here relationship of affiant to registrant, or the word "none," as the case may be.)

; that I know of my own knowledge that the

answers to questions Nos. are true; and that my relation-
(Insert here question numbers in figures.)ship by blood or marriage to said registrant is
(Insert here either relationship, or "none," as the case may be.)

(Signature of affiant.)

Subscribed and sworn to before me this day of, 1917.

(Signature of officer.)

(Designation of officer.)

NOTE.—See Sections 10 and 95, R. S. B.

REGISTRANT'S AFFIDAVIT.

IMPORTANT INSTRUCTIONS.—1. If the registrant can not read, the questions and his answers must be read to him by the officer who administers the oath, and if the registrant can not write, his cross-mark signatures must all be witnessed by the same officer.

2. None of the printed matter of the affidavit may be added to, erased, or stricken out, except the word "swear" or "affirm" as the case may be.

OATH.

STATE OF

County of, ss:

I, William M. Menez, do solemnly swear—affirm—that I am the
(Erase one or the other.)

registrant named and described in the foregoing questions and answers; that I have signed my name to my answers, and that I know the contents of my said answers, and that all and singular the statements of fact in my said answers to said questions, respectively, are true, and that my beliefs and opinions therein stated are my true beliefs and opinions.

Wm Menez
(Signature of registrant.)

Subscribed and sworn to before me this 31 day of Dec, 1917.

Joseph B. Buntin Notary Public, Napa, Calif.
(Designation of officer.)

NOTE.—See Sections 10 and 95, R. S. B.

My Comm. Exp. April 11, 1919

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1. MINUTE OF ACTION BY LOCAL BOARD ON CLAIM FOR DEFERRED CLASSIFICATION.

The Local Board classifies the registrant as shown on the Cover Sheet hereof because it finds that he is an alien (not an enemy) who claims exemption.

721.7 1918
(Date.)

2. RECOMMENDATION BY LOCAL TO DISTRICT BOARD ON INDUSTRIAL

(Date.)

(Number.)

3. CLAIM OF APPEAL TO DISTRICT BOARD.

I hereby claim appeal from classification by the Local Board in Class _____ in Division _____ and Class _____ in Division _____ and Class _____ in Division _____ and _____

(Date.)

(Signature of claimant.)

4. MINUTE OF ACTION BY DISTRICT BOARD ON { 1. Appeal from Local Board. 2. Classification by District Board.

The District Board { reclassifies } the registrant as shown on the Cover Sheet hereof because it finds that _____

(Date.)

(Number.)

5. MINUTE OF REASONS OF { District } BOARD FOR { 1. Extending time. 2. Refusing to extend time.

The application of the registrant to have the time for filing claim and proof extended is { granted } for the reason that _____

(Date.)

(Number.)

6. CLAIM OF APPEAL TO PRESIDENT.

I hereby claim appeal to the President from classification by the District Board in Class _____ in Division _____ and Class _____ in Division _____ Certificates and recommendations required by section one hundred eleven, S. S. R., are attached.

(Date.)

(Signature of claimant.)

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[fol. 265]

GOVERNMENT'S EXHIBIT 22

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW
YORK

Stipulation C 106-291

UNITED STATES OF AMERICA

vs.

WELWEL WARSZOWER, Alias "ROBERT WILLIAM WIENER,"
Defendant

It is hereby stipulated and agreed by and between the parties to the above-named action that the handwriting, hereinafter referred to, on a passport application in the name of Robert William Wiener (a photostatic copy of which application is annexed hereto and marked Exhibit "A")* on which said application passport No. 332207 was issued July 21, 1936, by the Department of State, is conceded and admitted by the defendant to have been written by him.

The handwriting hereinbefore referred to in the said passport application (Exhibit "A") is the following:

On the First Page

(1) The written words "Robert William Wiener" after the printed word "I," above the printed words "(Name in full)," and before the printed words "a Citizen of the United States."

(2) The written words "Atlantic City, N. J., U.S. A.," after the printed words "I solemnly swear that I was born [fol. 266] at" above the printed words "(Town or city)" "(Province or county)" "(Country)," and before the printed word "on."

* Exhibit A annexed to this stipulation is the same as Government's Exhibit 1 in evidence, supra at page 238.

(3) The written words and numerals "Sept. 5th, 1896," after the printed word "on," above the printed word "(Date)," and before the printed words "that I came to the United States."

(4) The written words "New York NY" after the printed word "at," above the printed words "(City)" "(State)," and before the printed words "that I am domiciled in the United States."

(5) The written words and numerals "893 Crotona Park North" after the printed words "my permanent residence being at," above the printed words "(Street address)," and before the printed words "in the city of."

(6) The written word "Bronx" appearing after the printed words "in the city of," and before the printed words "State of."

(7) The written words "New York" appearing after the printed words "State of," and before the printed words "and that I have resided."

(8) The written words "Solomon Wiener" appearing after the printed words "My father," above the printed word "(Name)," and before the printed words "was born at."

(9) The written word "Austria" appearing after the printed words "was born at," and before the printed word "on."

(10) The written numerals "1861" appearing after the printed word "on" and before the printed words "and is now residing at."

(11) The written word "dead" appearing after the printed words "and is now residing at."

[fol. 267] (12) The written numerals "1883" appearing after the printed numeral "1," above the printed word "(Year)," and before the printed word "resided."

(13) The written numerals "51" appearing after the printed word "resided" and before the printed words "years continuously."

(14) The written numerals "883" appearing after the printed words and numeral "United States from 1," and before the printed word and numeral "to 1."

(15) The written numerals "934" appearing after the printed word and numeral "to 1" and before the printed words "and was naturalized."

(16) The written words and numerals "August 25/1917" appearing after the printed words "I was married on," above the printed words "(A woman must insert date of each marriage)," and before the printed word "to."

(17) The written words "Esther Greson" appearing after the printed word "to," and before the printed words "who was born at."

(18) The written word "Illinois" appearing after the printed words "who was born at," and before the printed word "on."

(19) The written word and numerals "Feb. 20, 1901" appearing after the printed word "on," and before the printed words "and who."

(20) The written words "France, Belgium & Switzerland Vacation" appearing after the printed words "for the purposes indicated:" above the printed words "(Names of countries to be visited)" "(Purposes of visits)," and before the printed words "and I intend to return."

[fol. 268] (21) The written numerals "2-3" appearing after the printed words "United States within," and before the printed word "months."

(22) The written words "New York" appearing after the printed words "United States from the port of," above the printed words "(Port of departure)," and before the printed words "sailing on board the."

(23) The written word "Pennland" appearing after the printed words "on board the," above the printed words "(Name of ship)," and before the printed word "on."

(24) The written word and numerals "July 25" appearing after the printed word "on," above the printed words "(Date of departure)," and before the printed numerals "19."

(25) The written numerals "36" appearing after the printed numerals "19," and before the printed words "My last American."

On the Second Page

(26) The written numeral "5" appearing after the printed word "Height" and before the printed word "feet."

(27) The written numeral "2" appearing after the printed word "feet" and before the printed word "inches."

(28) The written word "Blond" appearing after the printed word "Hair" and before the printed word "Eyes."

(29) The written word "Gray" appearing after the printed word "Eyes," and before the printed words "Distinguishing marks."

(30) The written words "Atlantic City, N. J." appearing after the printed words "Place of birth," above the printed words "(City and State)," and before the printed words "Date of birth."

[fol. 269] (31) The written words and numerals "Sept. 5th, 1896" appearing after the printed words "Date of birth," above the printed words "(Month, day, and year)," and before the printed word "Occupation."

(32) The written words "Advertising manager & accountant" appearing after the printed word "Occupation," and above the printed word "Address."

(33) The written words "Robert William Wiener" appearing after the printed word "Name" and before the printed words "Number and Street."

(34) The written words and numerals "893 Crotona Park North, ap. 3c" appearing after the printed words "Number and Street," and before the printed words "City and State."

(35) The written words "Bronx, N. Y." appearing after the printed words "City and State," and before the printed words "I solemnly swear."

(36) The written words "Robert William Wiener" appearing after the printed words "So help me God" above the printed words "(Signature of Applicant)," and before the printed words "Subscribed and sworn to."

Dated: New York, N. Y., January 8, 1940.

Robert William Wiener, Defendant in Person, Stanley Fowler, Attorney for Defendant, John T. Cahill, United States Attorney for the Southern District of New York.

[fol. 270]

GOVERNMENT'S EXHIBIT 23

Photographic enlargement of photograph on Government's Exhibit 13.

GOVERNMENT'S EXHIBIT 24

Photographic enlargement of signature on Government's Exhibit 13.

GOVERNMENT'S EXHIBIT 25

Photographic enlargement of signature on Government's Exhibit 15.

GOVERNMENT'S EXHIBIT 26

Photographic enlargement of signature on Government's Exhibit 18.

GOVERNMENT'S EXHIBIT 27

Photographic enlargement of signature on Government's Exhibit 12.

[fol. 271]

GOVERNMENT'S EXHIBIT 28

Photographic enlargement of signature on portion of Government's Exhibit 1.

GOVERNMENT'S EXHIBIT 29

Photographic enlargement of signature on portion of Government's Exhibit 1.

GOVERNMENT'S EXHIBIT 30

Photographic enlargement of signature on portion of Government's Exhibit 3.

GOVERNMENT'S EXHIBIT 31

Photographic enlargement of signature on portion of Government's Exhibit 8.

GOVERNMENT'S EXHIBIT 32

Photographic enlargement of signature on portion of Government's Exhibit 8.

[fol. 272] GOVERNMENT'S EXHIBIT 33

Photographic enlargement of signature on portion of Government's Exhibit 1.

GOVERNMENT'S EXHIBIT 34

Photographic enlargement of signature on portion of Government's Exhibit 1.

GOVERNMENT'S EXHIBIT 35

Photographic enlargement of signature on portion of Government's Exhibit 10.

GOVERNMENT'S EXHIBIT 36

Photographic enlargement of signature on portion of Government's Exhibit 11.

GOVERNMENT'S EXHIBIT 37

Photographic enlargement of signature on portion of Government's Exhibit 10.



CITY OF ATLANTIC CITY

DEPARTMENT OF HEALTH

I, Alfred T. Glenn, Registrar of Vital Statistics of Atlantic City, do hereby Certify, That the following is a True and Correct Transcript from the Record of Births in my office.

DATE OF BIRTH	PLACE OF BIRTH	NAME OF CHILD	SEX OF CHILD
Sept. 5th. 1896.	Atlantic City	Robert William Wiener	Male

NAME OF PARENTS	OCCUPATION OF FATHER	RESIDENCE OF PARENTS
Solomon Wiener Rivla Rodgersky	Merchant	2224 Atlantic Ave.

CERTIFICATE SIGNED BY

A. W. Baily, M. D.

In Testimony Whereof, I have herewith set my hand and affixed the Official seal of the said Department of Atlantic City, this
Seventh day of

July, A. D., 1936.

Alfred T. Glenn
Registrar of Vital Statistics

ATTEST:

Samuel L. Salasin
Health Officer

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**CERTIFIED COPY OF
RECORD OF BIRTH
OF**

Robert William Wiener

Born

September, 5th. 1896.

ATLANTIC CITY, N. J.

PASSPORT APPLIED FOR

JUL 13 1936

PASSPORT AGENCY
NEW YORK, N. Y.

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[fol. 273] DEFENDANT'S EXHIBIT A FOR IDENTIFICATION

Photostatic copy of Defendant's Exhibit C.

[fol. 274] DEFENDANT'S EXHIBIT B FOR IDENTIFICATION

Pamphlet entitled "Notice to Bearers of Passports," 1939
edition.

EXHIBIT C
U. S. Dist. Court
S. D. of N. Y.
FEB 9 1940



CITY OF ATLANTIC CITY

DEPARTMENT OF HEALTH

I, Alfred T. Glenn, Registrar of Vital Statistics of Atlantic City, do hereby Certify, That the following is a True and Correct Transcript from the Record of Births in my office.

DATE OF BIRTH	PLACE OF BIRTH	NAME OF CHILD	SEX OF CHILD
Sept. 5th. 1896.	Atlantic City	Robert William Wiener	Male
NAME OF PARENTS		OCCUPATION OF FATHER	RESIDENCE OF PARENTS
Solomon Wiener Rivla Rodgersky		Merchant	2224 Atlantic Ave.

CERTIFICATE SIGNED BY

A. W. Baily, M. D.

In Testimony Whereof, I have herewith set my hand and affixed the Official seal of the said Department of Atlantic City, this

Seventh

day of

July, A. D., 1936.

Alfred T. Glenn
Registrar of Vital Statistics

ATTEST:

Samuel L. Salasin
Health Officer

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**CERTIFIED COPY OF
RECORD OF BIRTH
OF**

Robert William Wiener

Born

September, 5th, 1896,

ATLANTIC CITY, N. J.

**PASSEPORT A. L. J. NY
NEW YORK, N. Y.**

JUL 13 1936

PASSEPORT APPLIED FOR

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State of New Jersey, Atlantic County, ss.

I, WILLIAM A. BLAIR, Clerk of the County of Atlantic and also Clerk of the Court of Common Pleas, the Court of Oyer and Terminer, the Court of Quarter Sessions, the Court of Special Sessions, and the Juvenile Court, holden in and for said County, the same being Courts of Record, having a common seal, do hereby certify that the foregoing is a full, true and correct copy of a Birth Certificate, is properly attested by the Keeper of said Records of births and that the seal of the Keeper of said office is annexed to said certificate and that the attestation of said record is in due form and signed by the proper officers.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Courts and County, at Mays Landing, N. J., this 8th

day of February A. D. one thousand nine hundred and forty, [19 40.]

W. A. Blair
Clerk.

State of New Jersey, Atlantic County, ss.

I, PALMER M. WAY, one of the President Judges of the Court of Common Pleas, Judges of the Court of Quarter Sessions, Judges of the Court of Special Sessions, Judges of the Juvenile Court and Judges of the Court of Oyer and Terminer, of the County of Atlantic, do certify that William A. Blair, by whom the foregoing Certificate and Attestation was made and given, and who in his own proper handwriting has thereunto subscribed his name and affixed his official seal, was at the time of so doing, and now is, Clerk of Atlantic County and Clerk of the Court of Common Pleas, the Court of Oyer and Terminer, the Court of Quarter Sessions, the Court of Special Sessions and the Juvenile Court in and for the said County of Atlantic, in the State of New Jersey, duly commissioned and qualified; to all whose acts as such, full faith and credit are and ought to be given, as well in Courts of Judicature as elsewhere. And that the said Certificate and Attestation is in due form, and made by the proper officer, and that the said Certificate as attested would be received in evidence in the Courts in the State of New Jersey.

In Testimony Whereof, I have hereunto set my hand, the 8th day of February one thousand nine hundred and forty, [19 40.]

Palmer M. Way
Judge.

State of New Jersey, Atlantic County, ss.

I, WILLIAM A. BLAIR, Clerk of Atlantic County and Clerk of the Court of Common Pleas, the Court of Oyer and Terminer, the Court of Quarter Sessions, the Court of Special Sessions and the Juvenile Court, of the County of Atlantic, do certify that the Honorable Palmer M. Way, by whom the foregoing Attestation was made, and whose name is thereunto subscribed, was at the time of making thereof, and still is, one of the President Judges of the Court of Common Pleas, Judges of the Court of Quarter Sessions, Judges of the Court of Special Sessions, Judges of the Juvenile Court and Judges of the Court of Oyer and Terminer of the said County of Atlantic, duly commissioned and sworn; to all whose acts as such, full faith and credit are and ought to be given, as well in Courts of Judicature as elsewhere.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Courts and County, the 8th day of February one thousand nine hundred and forty, [19 40.]

W. A. Blair
Clerk.

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[fol. 275]

DEFENDANT'S EXHIBIT C

(Photostat)

[fol. 276] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE SECOND CIRCUIT

[Title omitted]

STIPULATION WITH REFERENCE TO EXHIBITS

It is hereby stipulated, consented and agreed by and between the attorneys for the respective parties hereto, that the originals of all and any of the exhibits herein may be produced upon the argument of this appeal.

Dated, New York, March —, 1940.

John T. Cahill, United States Attorney, by Robert L. Werner, for the Government, Osmond K. Fraenkel, Edward I. Aronow, Attorneys for Appellant.

[fol. 277] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL

Name and address of appellant—Welwel Warszower, alias “Robert William Wiener”, 485 Central Park West—c/o S. Feldman—New York City.

Name and address of appellant’s attorneys—Edward I. Aronow, 165 Broadway, New York, N. Y.; Osmond K. Fraenkel, 76 Beaver St., New York, N. Y.

Offense—Unlawful use of a passport in violation of Title 22, Section 220 of the United States Code.

Date of judgment—February 20, 1940.

Brief description of judgment or sentence—Two years imprisonment; place of confinement to be designated by the Attorney General of the United States.

Name of prison where now confined, if not on bail—Execution stayed until February 27, 1940 pending which an application is to be made to the Circuit Court of Appeals for bail pending appeal. Bail originally furnished in the amount of \$10,000 continued.

[fol. 278] I, the above named Appellant, hereby appeal to the United States Circuit Court of Appeals for the Second

Circuit from the judgment above-mentioned on the grounds set forth below.

Welwel Warszower, Robert William Wiener, Appellant.

Dated February 20, 1940.

GROUND OF APPEAL

1. The Court erred in denying the motion of the appellant to dismiss the indictment made at the end of the government's case or, in the alternative, for a directed verdict of acquittal.

2. The Court erred in allowing into evidence government's Exhibit 6, the manifest of the S.S. Normandie.

3. The Court erred in denying the motion to strike out the testimony of the Immigration and Naturalization Inspector Faire, whose testimony was indefinite, uncertain and contradictory.

4. The Court erred in denying the motion to withhold from submission to the jury the issue with respect to the alleged falsity of the name, Robert William Wiener, as used by the appellant in his application for the passport in the light of the fact that the government's testimony and exhibits indicated that the name Wiener had been used for a great number of years by the appellant before making the application for the passport.

[fol. 279] 5. The Court erred in refusing to charge as requested by the appellant as follows:

"19. While it is desirable that the jurors agree upon a verdict after a full and fair discussion, nevertheless, it is the duty of each and every member of the jury to decide the issues presented for himself or herself, and, if, after a careful consideration of the evidence in the case and the instructions of the Court and a free consultation with his fellows, there is in any juror's mind a reasonable doubt as to the defendant's guilt, it is his or her duty, under his or her oath, to stand by this opinion. No juror should yield his or her view simply because all the other jurors may disagree with him or her.

"20. A United States passport is a document which has no sanctioned use in the Port of New York. It is a docu-

ment solely for use in foreign countries. Although it may be used to identify the bearer in the Port of New York, such use is not the kind of use that was contemplated by Congress when it enacted the section under which this defendant is indicted.

"21. There is no direct evidence in the case that the defendant used and presented a passport to an Inspector of Immigration and Naturalization, as charged in the indictment, in the Port of New York on September 30, 1937.

"26. You are not permitted to infer that by reason of the fact that there appears Passport No. 332207 on the S.S. Normandie manifest, which number corresponds with the number which appears on the application for a passport, the defendant used a passport when entering the Port of New York on September 30, 1937, as alleged in the indictment [fol. 280] ment. In other words, you have no right to draw an inference from an inference.

"27. If you find that the only manner in which you can assume that this defendant presented a passport to the Inspector of Immigration and Naturalization would be based on an inference derived from a further inference that this defendant showed a passport to the purser of the S.S. Normandie, then it is your duty to acquit.

"28. The mere fact that the number appearing on the passport application corresponds with the number appearing on the steamship manifest is no proof that the defendant used the passport in entering the Port of New York on September 30, 1937, for the reason that the law does not permit presumptions to be drawn upon presumptions.

"30. If you find that the defendant used the name, Robert William Wiener, or a variation thereof, such as William Wiener, for many years prior to 1936, when he made an application for Passport No. 332207, then you must disregard the charge in the indictment that he falsely stated that his name was Robert William Wiener. In this regard, I charged you that under the law a man may change his name at will so long as he does not do so for a fraudulent purpose. I also direct your attention to the fact that the defendant used the name William Wiener as far back as 1917, and that the prosecution's witness, Max Bedacht, testified that he always knew the defendant as William Wiener and that he knew him from 12 to 15 years.

"33. The witness Earle testified that he himself made the [fol. 281] inscription upon the application for the passport, which inscription the witness Earle interpreted as the word "none." He testified further that he had no independent recollection concerning a conversation with the defendant with respect to this answer. He bases his reason for the inscription upon a custom of questioning applicants concerning blank spaces in their applications. Such proof is purely circumstantial. Under the circumstances, therefore, you are permitted to assume that the witness Earle inferred the answer "none" from the ambiguity of the preceding blanks concerning continuity of residence, rather than from the alleged conversation with the defendant. It is your duty to adopt the hypothesis of innocence and find that the defendant in no way is responsible for the appearance of this inscription "none." In any extent, if you find that the inscription made by the witness Earle in the blank space dealing with residence abroad was not easily, clearly and immediately legible, then you must find that the defendant had no knowledge of the significance of such an inscription. In that event, you must find that there was no false statement made by the defendant concerning his residence abroad."

6. The Court erred in denying the motion to dismiss the indictment and set aside the verdict upon the ground that the statute of limitations barred the prosecution of the alleged offense set forth in the indictment.

7. The Court erred in holding that the alleged use of a passport was a violation of the statute as contemplated by Congress in its enactment of Section 220 of Title 22 of the United States Code.

[fol. 282] 8. The Court erred in submitting the case to the jury on the ground that the testimony and the evidence tending to prove the alleged use of the passport on September 30, 1937 was based upon inference on inference.

9. The Court erred in denying the motion for directed verdict of acquittal and in submitting the case to the jury on the ground that the proof of the alleged crime was circumstantial and the testimony was equally consistent with the hypothesis of innocence on its face.

10. The Court erred in denying the motion of the appellant to dismiss the indictment made at the end of the entire case.

11. The Court erred in denying the motion to set aside the verdict.

12. The Court erred in denying the motion for a new trial.

13. The Court erred in denying the motion in arrest of judgment.

14. The grounds set forth hereinabove are not intended to limit the assignment of errors to be hereinafter filed.

[fol. 283] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS

Now comes defendant-appellant, Welwel Warszower, and for his assignment of errors, on the appeal duly taken by him, from the judgment of conviction rendered February 15, 1940, respectfully shows:

1. The Court erred in allowing into evidence Government's Exhibit 6, the manifest of the S.S. Normandie.

2. The Court erred in denying the motion to strike from the record Government's Exhibit 6, the manifest of the S.S. Normandie.

3. The Court erred in denying the motion to strike out the testimony of the Immigration and Naturalization Inspector Faire, whose testimony was indefinite, uncertain and contradictory.

4. The Court erred in denying the motions made at the end of the Government's case to dismiss the indictment and for a directed verdict of acquittal, upon the ground that the indictment failed to allege a crime against the laws of the United States.

[fol. 284] 5. The Court erred in denying the motions made at the end of the Government's case to dismiss the indictment and for a directed verdict of acquittal, upon the ground that the Government has failed to prove a case against the defendant-appellant.

6. The Court erred in submitting the case to the jury on the ground that the testimony and the evidence tending

to prove the alleged use of the passport on September 30, 1937, was inference based on inference.

7. The Court erred in denying the motion for a directed verdict of acquittal and in submitting the case to the jury on the ground that the proof of the alleged crime was circumstantial and the testimony was equally consistent with the hypothesis of innocence on its face.

8. The Court erred in denying the motion to dismiss the indictment, or in the alternative, for a directed verdict of acquittal, on the ground that the alleged presentation of the passport on September 30, 1937, was based upon an inference that the defendant had a passport in his possession, which in turn was based on an inference which was presumed from the fact that a number appears on the manifest, Government's Exhibit 6, which corresponds with the number on the application for a passport, which is Government's Exhibit I.

9. The Court erred in denying the motion to dismiss the indictment, or in the alternative, for a directed verdict of acquittal, on the ground that the Government failed to prove that the appellant presented a passport to the Immigration Inspector on September 30, 1937, on the occasion of his entry in the Port of New York.

10. The Court erred in denying the motion for a directed verdict of acquittal, on the ground that the Government [fol. 285] failed to prove that the appellant used and presented a passport to the Immigration Inspector on September 30, 1937.

11. The Court erred in denying the motion to dismiss the indictment by holding that the alleged use of the passport in entering the Port of New York on September 30, 1937, was a violation of the statute as contemplated by Congress in its enactment of Section 220 of Title 22 of the United States Code.

12. The Court erred in denying the motion to withhold from submission to the jury, or in the alternative, to direct the jury to find for the appellant, with respect to the alleged false statement, as charged in the indictment, concerning the true name of the appellant, on the ground that the Government's testimony and evidence proved that the alleged false statement concerning the name of the appellant was not proven false.

13. The Court erred in denying the motion to withhold from submission to the jury, or in the alternative, to direct the jury to find for the appellant, with respect to the alleged false statement, as charged in the indictment, concerning the citizenship of the appellant, on the ground that there was a failure of proof on the part of the Government respecting the alleged falsity of this statement.

14. The Court erred in denying the motion to withhold from submission to the jury, or in the alternative, to direct the jury to find for the appellant, with respect to the alleged false statement, as charged in the indictment, concerning the birthplace of the appellant, in Atlantic City, New Jersey, on September 5, 1896, on the ground that there was a failure of proof on the part of the Government respecting the alleged falsity of this statement.

[fol. 286] 15. The Court erred in denying the motion to withhold from submission to the jury, or in the alternative, to direct the jury to find for the appellant, with respect to the alleged false statement, as charged in the indictment, concerning the residence abroad of the appellant, on the ground that there was a failure of proof on the part of the Government respecting the alleged falsity of this statement.

16. The Court erred in submitting all four alleged false statements to the jury, and in charging that it could find appellant guilty if it believed any one of the statements to have been falsely made, which charge is below fully set forth, since there was insufficient evidence of the falsity of at least one of these statements:

"So, I say to you if you find only one of the representations to have been false, that that is sufficient to allow a verdict of guilty to be rendered here, in the event you are satisfied beyond a reasonable doubt that such assertion was knowingly, fraudulently and wilfully made."

17. The Court erred in charging the jury that a trip abroad would constitute residence outside the United States, which charge is below fully set forth:

"Whether or not he understood, what the Government wanted to know was whether or not he had been out of the country."

18. The Court erred in holding that the alleged false statement with respect to residence, as set forth in the in-

dictment, could have induced the issuance of the passport to the appellant.

19. The Court erred in denying the motions renewed at the end of the entire case to dismiss the indictment and for [fol. 287] a directed verdict of acquittal, upon the ground that the indictment failed to allege a crime against the laws of the United States.

20. The Court erred in denying the motions renewed at the end of the entire case to dismiss the indictment and for a directed verdict of acquittal, upon the ground that the Government had failed to prove a case against the defendant-appellant.

21. The Court erred in denying the motion of the appellant for a mistrial, upon the ground that a postcard, marked Government's Exhibit 38 for identification, was received by the forelady of the jury.

22. The Court erred in refusing to charge defendant's request to charge, numbered "19", as follows:

"While it is desirable that the jurors agree upon a verdict after a full and fair discussion, nevertheless, it is the duty of each and every member of the jury to decide the issues presented for himself or herself, and, if, after a careful consideration of the evidence in the case and the instructions of the Court and a free consultation with his fellows, there is in any juror's mind a reasonable doubt as to the defendant's guilt, it is his or her duty, under his or her oath, to stand by this opinion. No juror should yield his or her view simply because all the other jurors may disagree with him or her."

23. The Court erred in refusing to charge defendant's request to charge, numbered "20", as follows:

"A United States passport is a document which has no sanctioned use in the Port of New York. It is a document [fol. 288] solely for use in foreign countries. Although it may be used to identify the bearer in the Port of New York, such use is not the kind of use that was contemplated by Congress when it enacted the section under which this defendant is indicted."

24. The Court erred in refusing to charge defendant's request to charge, numbered "21", as follows:

"There is no direct evidence in the case that the defendant used and presented a passport to an Inspector of Immigration and Naturalization, as charged in the indictment, in the Port of New York on September 30, 1937."

25. The Court erred in refusing to charge defendant's request to charge, numbered "26", as follows:

"You are not permitted to infer that by reason of the fact that there appears Passport No. 332207 on the S.S. Normandie manifest, which number corresponds with the number which appears on the application for a passport, the defendant used a passport when entering the Port of New York on September 30, 1937, as alleged in the indictment. In other words, you have no right to draw an inference from an inference."

26. The Court erred in refusing to charge defendant's request to charge, numbered "27", as follows:

"If you find that the only manner in which you can assume that this defendant presented a passport to the Inspector of Immigration and Naturalization would be based on an inference derived from a further inference that this defendant showed a passport to the purser of the S.S. Normandie, then it is your duty to acquit."

[fol. 289] 27. The Court erred in refusing to charge defendant's request to charge, numbered "28", as follows:

gress in its enactment of Section 220 of Title 22 of the port application corresponds with the number appearing on the steamship manifest is no proof that the defendant used the passport in entering the Port of New York on September 30, 1937, for the reason that the law does not permit presumptions to be drawn upon presumptions."

28. The Court erred in refusing to charge defendant's request to charge, numbered "30", as follows:

"If you find that the defendant used the name, Robert William Wiener, or a variation thereof, such as William Wiener, for many years prior to 1936, when he made an application for Passport No. 332207, then you must disregard the charge in the indictment that he falsely stated that his name was Robert William Wiener. In this regard, I charge you that under the law a man may change his name

at will so long as he does not do so for a fraudulent purpose. I also direct your attention to the fact that the defendant used the name William Wiener as far back as 1917, and that the prosecution's witness, Max Bedacht, testified that he always knew the defendant as William Wiener and that he knew him from 12 to 15 years."

29. The Court erred in refusing to charge defendant's request to charge, numbered "33", as follows:

"The witness Earle testified that he himself made the inscription upon the application for the passport, which inscription the witness Earle interpreted as the word 'none.' He testified further that he had no independent [fol. 290] recollection concerning a conversation with the defendant with respect to this answer. He bases his reason for the inscription upon a custom of questioning applicants concerning blank spaces in their applications. Such proof is purely circumstantial. Under the circumstances, therefore, you are permitted to assume that the witness Earle inferred the answer 'none' from the ambiguity of the preceding blanks concerning the continuity of residence, rather than from the alleged conversation with the defendant. It is your duty to adopt the hypothesis of innocence and find that the defendant in no way is responsible for the appearance of this inscription 'none.' In any event, if you find that the inscription made by the witness Earle in the blank space dealing with residence abroad was not easily, clearly and immediately legible, then you must find that the defendant had no knowledge of the significance of such an inscription. In that event you must find that there was no false statement made by the defendant concerning his residence abroad."

30. The Court erred in giving the following instructions to the jury, over the objection of the defendant-appellant, to which instructions the defendant-appellant duly and regularly excepted:

"Mr. Fowler: May I except to that portion of your Honor's charge which states in words or substance if the jury are convinced that the defendant made a false statement as to his residence. I would ask your Honor to charge that they must be satisfied from the evidence that the defendant understood what residence was."

The Court: Whether or not he understood, what the Government wanted to know was whether or not he had been out of the country."

[fol. 291] 31. The Court erred in entering judgment against the defendant-appellant, upon the verdict of the jury.

32. The Court erred in denying the motion to set aside the verdict of the jury and for a new trial and in arrest of judgment.

33. The Court erred in denying the motion to set aside the verdict of the jury and for a new trial on the ground that the verdict was contrary to law, contrary to the evidence, and contrary to the weight of the evidence.

34. The Court erred in denying the motion to dismiss the indictment and set aside the verdict upon the ground that the statute of limitations barred the prosecution of the alleged offense set forth in the indictment.

Wherefore, said defendant-appellant, Welwel Warszawer, for the errors aforesaid, prays that said judgment of conviction be reversed.

Dated, New York, March 25, 1940.

Osmond K. Fraenkel, 76 Beaver Street, New York City; Edward I. Aronow, 165 Broadway, New York City, Attorneys for Appellant.

[fol. 292] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION SETTLING BILL OF EXCEPTIONS

It Is Hereby Stipulated and Agreed by and between the attorneys for the respective parties hereto, that the foregoing is a transcript of the pertinent evidence taken at the trial of this action and the exceptions contained therein, and that the same may be settled and ordered on file as the bill of exceptions herein.

Dated, New York, March 25, 1940.

John T. Cahill, United States Attorney. By Robert L. Werner for the Government. Osmond K. Fraenkel, Edward I. Aronow, Attorneys for Appellant.

[fol. 293] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER SETTLING BILL OF EXCEPTIONS

The foregoing is hereby settled and allowed as the Bill of Exception herein and ordered to be filed as part of the transcript of the record herein.

Dated, New York, March 25, 1940.

Jno. C. Knox, United States District Judge.

[fol. 294] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO RECORD

It Is Hereby Stipulated and Agreed that the foregoing is a correct transcript of the record of said District Court in the above entitled matter and that the clerk may certify same as the record on appeal as agreed upon by the parties.

Dated, New York, March 25, 1940.

John T. Cahill, United States Attorney. By Robert L. Werner, for the Government. Osmond K. Fraenkel, Edward I. Aronow, Attorneys for Appellant.

[fol. 295] Clerk's Certificate to foregoing transcript omitted in printing.

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[fol. 296] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
SECOND CIRCUIT, OCTOBER TERM, 1939

No. 334

(Argued May 6, 1940. Decided July 9, 1940)

THE UNITED STATES OF AMERICA, Appellee,
against

WELWEL WARSZOWER, Defendant-Appellant

Appeal from the District Court of the United States for the
Southern District of New York

Welwel Warszower, also known as Robert William Wiener, was convicted of willfully and knowingly using a passport obtained by false statements. Affirmed.

Before L. Hand, Chase and Patterson, Circuit Judges

[fol. 297] Osmond K. Fraenkel and Edward I. Aronow,
for appellant.

John T. Cahill, Lester C. Dunigan, Frank H. Gordon,
Robert L. Werner and Ashley J. Nicholas, for United
States.

PATTERSON, Circuit Judge:

The appellant was convicted of violation of 22 U. S. Code, section 220, to the effect that "whoever shall willfully and knowingly use * * * any passport the issue of which was secured in any way by reason of any false statement" shall be subject to fine or imprisonment or both. The indictment charged that the appellant on September 30, 1937 used a passport in that he presented it to an immigrant inspector for the purpose of securing entry into the United States, and that the passport so used had been secured by false statements concerning name, citizenship, place of birth and residence. At the trial the prosecution showed that in July 1936 the appellant applied for passport as Robert William Wiener, claiming Atlantic City, New Jersey, as his place of birth and showing a certified extract from the record of births in the office of the registrar of vital statistics of Atlantic City. He stated that

he was a citizen of the United States and had never resided outside the United States. A passport bearing number 332,207 was accordingly issued. To prove use of the passport by the appellant, one Faire, an immigrant inspector, was called as a witness. Faire testified that on September 30, 1937 he boarded the steamer Normandie on its arrival at New York and examined the passengers to determine who were citizens and entitled to immediate entry, that the ship's manifest bore his signature and that while he had no recollection of the appellant, he could say from the [fol. 298] name of Robert Wiener on the manifest, with passport number 332,207 alongside, that the passport had been presented to him, it being his invariable practice to examine the passport where the passport number was entered on the manifest, to check the information in the passport with the information on the manifest and to compare the photograph on the passport with the individual who presented it. Faire also testified that it was customary for citizens returning from abroad to present their passports. On the issue of falsity of the appellant's statements in applying for passport, there was evidence that the appellant in 1914 arrived in the United States under the name of Warszower, that the ship's manifest showed him to be of Russian nationality, born in Russia and never before in the United States, and that the appellant's declarations on arrival corresponded to the information in the manifest. In 1917 the appellant registered for the draft as Weiner and claimed exemption as an alien, born in Russia. In 1932 he made application for reentry permit under the name of Warszower, stating that he was an alien born in Russia and had entered this country in 1914. There was also evidence that the entry of the appellant's birth in the Atlantic City records was a forgery.

The case went to the jury, and a verdict of guilty was returned.

It is urged in the appellant's behalf that the presentation of a United States passport to an immigrant inspector on reentry into the country is not a "use" of the passport within the meaning of the statute. There was evidence in the case that it is customary for citizens returning from abroad to make this use of their passports. We considered the point in *United States v. Bröwder*, decided June 24,

1940, and held that such a use is within the reach of the statute. Further discussion is unnecessary.

[fol. 299] The appellant also urges that there was insufficient evidence that he presented the passport to the immigrant inspector. The argument rests on a supposed equivocation in the testimony of Faire, the immigrant inspector. Faire did say that an American citizen did not need a passport to enter the country, that he could prove citizenship in some other way, and that the check mark which he made after the appellant's name did not necessarily mean that a passport was shown. But he testified repeatedly that the entry of the passport number on the manifest enabled him to say with assurance that he had been shown the passport and had checked the information on the manifest as to residence and place of birth against information in the passport. His testimony, if believed by the jury, made it plain that the passport issued to the appellant had been exhibited to him.

A third point is that the court below erred in submitting all four alleged false statements to the jury, and that the error was crucial because the jury was charged that it might find the appellant guilty if convinced that any one of the four statements was false. The argument is that however it may have been as to the statement of name and place of birth, there was not enough evidence as to falsity of the statement that the appellant was a citizen of this country and of the statement that he had never resided abroad. It is not denied that there was proof of the appellant's declarations in 1914, 1917 and 1932 that he was an alien and that he had been born abroad, which necessarily meant that he had resided abroad. But it is urged that it was not enough for the government thus to match the appellant's earlier declarations against his statements in applying for passport and to rely on the former as proof that the later statements were false.

There is no merit in the argument. It is the rule that an accused may not be convicted on his uncorroborated confession. Wharton's Criminal Law, (12th Ed.) sections 357-[fol. 300] 359. While the wisdom of such an arbitrary mandate is questionable, its existence in most of our states cannot be doubted. *Daeche v. United States*, 250 F. 566 (C. C. A. 2). The rule, however, has to do only with uncorroborated confessions or admissions after the event,

and there were no confessions or admissions after the event in this case. What the appellant wants is an extension of the rule to uncorroborated declarations of the accused made before the event. He says in effect that the falsity of a defendant's statement that he has never resided abroad may not be proved by his repeated prior declarations that he was born abroad and came to this country when he was 21, unless there be also independent evidence of residence abroad. The policy behind the requirement of corroboration for a confession is protection against the risk of an untrue confession, coerced or psychopathic. Wigmore on Evidence, 2070-2072. That policy obviously has no bearing on declarations freely made years before the commission of the alleged offense. We know of no cases that push the uncorroborated confession rule to declarations of the accused made before the occurrence of the alleged crime, other than *Gordnier v. United States*, 261 F. 910 (C. C. A. 9); and *Duncan v. United States*, 68 F. (2d) 136 (C. C. A. 9). We think that those cases involve a departure from the reason of the rule, and we are unable to follow them. It would be arbitrary to the last degree to say that where a defendant has solemnly declared on three occasions that he was an alien and was born in Russia, such declarations are insufficient as matter of law to show the falsity of a later statement that he was a citizen and had never resided abroad.

The appellant's argument fails for another reason. There was corroborating evidence to support his earlier declarations of name, alienage, foreign birth and residence abroad. The manifest of the vessel that brought him here in 1914 gave his name as Warszower, his nationality Russian [fol. 301] and his birthplace Russia. There was evidence that the entry of his birth in the Atlantic City records was forged. There was evidence that he had never been naturalized. These pieces of proof served to fortify the truth of the appellant's own declarations, and that is all that the rule as to confessions requires. On this point we adhere to our own decision in *Daeche v. United States*, supra, rather than to *Forte v. United States*, 94 F. (2d) 236 (C. A., D. C.).

We have not overlooked the appellant's argument that the charge of the court on the subject of residence was erroneous. We find no error in this or in any other part

of the charge. The appellant had a fair trial; there were no errors; the verdict of the jury was supported by the evidence; and the judgment below will be affirmed.

[fol. 302] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND
CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 24th day of July one thousand nine hundred and forty.

Present: Hon. Learned Hand, Hon. Harrie B. Chase,
Hon. Robert P. Patterson, Circuit Judges.

THE UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

WELWEL WARSZOWER, Defendant-Appellant

Appeal From the District Court of the United States for
the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

D. E. Roberts, Clerk.

[fol. 303] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. United States of America v. Welwel Warszower. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed July 24, 1940. D. E. Roberts, Clerk.

[fol. 304] UNITED STATES OF AMERICA,
Southern District of New York:

I, D. E. Roberts, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the

foregoing pages, numbered from 1 to 303, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of United States of America, Plaintiff-Appellee, against Welwel Warszower, Defendant-Appellant, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 24th day of July, in the year of our Lord one thousand nine hundred and forty, and of the Independence of the said United States the one hundred and sixty-fifth.

D. E. Roberts, Clerk. (Seal.)

[fol. 305] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 14, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, and the case is assigned for argument immediately following No. 287.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Murphy took no part in the consideration and decision of this application.

Endorsed on Cover: Enter Edward I. Aronow. File No. 44687. U. S. Circuit Court of Appeals, Second Circuit. Term No. 338. Welwel Warszower, alias "Robert William Wiener," etc., Petitioner, vs. The United States of America. Petition for writ of certiorari and exhibit thereto. Filed August 14, 1940. Term No. 338 O. T. 1940.

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AUG 14 1940

CHARLES ELMORE CROPLEY
CLERK

No. 338

Supreme Court of the United States

WELWEL WARSZOWER, alias "Robert William
Wiener," etc.,

*Petitioner,**against*

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE CIR-
CUIT COURT OF APPEALS FOR THE SECOND CIRCUIT
AND BRIEF IN SUPPORT THEREOF**

OSMOND K. FRAENKEL,

EDWARD I. ARONOW,

Counsel for Petitioner.

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Supreme Court of the United States

WELWEL WARSZOWER, alias "Robert
William Wiener," etc.,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

*To the Chief Justice of the United States and
the Associate Justices of the Supreme
Court of the United States:*

WELWEL WARSZOWER, also known as William Wiener,
respectfully prays:

That a writ of certiorari issue to review the order of
the United States Circuit Court of Appeals for the Second
Circuit affirming a judgment of the District Court for the
Southern District of New York convicting petitioner of a
violation of United States Code Title 22 § 220.

Summary Statement

Petitioner was indicted for the use of a passport ob-
tained as the result of statements alleged to be false (R. 5).

Petitioner contends that the government failed to prove any use of the passport; that the use charged—a showing to an immigration inspector upon arrival in New York—was not a use in violation of the statute; that the government failed to establish the falsity of at least two of the statements alleged to have been false, thus requiring reversal since petitioner separately moved to exclude each of these statements from the jury (R. 198-205, 207) and the trial judge charged that conviction could result if any of the statements was false (R. 217).

Petitioner's contention that the showing of a passport to an immigration inspector upon arrival is not the kind of use contemplated by the statute rests on the same considerations as were advanced by the defense in *United States v. Browder*, 112 F. 2d , and the Circuit Court in the case at bar rested entirely on that decision in this regard.

Petitioner's contention that there was no proof of the use of the passport requires an analysis of the evidence. As to this the Circuit Court of Appeals said that the conflict was for the jury to resolve.

The only evidence of the use of the passport was that of Inspector Faire. He testified that he examined incoming passengers on the S. S. Normandie on September 30, 1937 (R. 53). He had no recollection of appellant (R. 53). He was shown a portion of the ship's manifest (Exhibit 6, p. 243), which, it was assumed, had been prepared by the purser (R. 50, 56), but which had been signed by the witness (R. 53). The purser did not testify. This manifest listed the names of various persons who were admitted as American citizens (R. 48). It shows numbers opposite their names (R. 47). Opposite the name of appellant was the number 332207 (R. 243). This was the number of the

passport issued on the application (Exhibit 1, p. 238, R. 27).

Faire testified on direct examination that appellant had presented his passport because its number appeared on the list (R. 53). On cross-examination, however, he said that it was not necessary for an incoming passenger to show a passport to establish his citizenship and thus his right to enter (R. 56). A birth certificate, or any other satisfactory means of identification, would suffice (R. 56 *cf.* 103). And Faire expressly said that he would not indicate on the manifest the nature of the identification produced (R. 56). When questioned by the Court as to the significance of the check mark, Faire said that it did not necessarily indicate that a passport had been shown. We shall, in the accompanying brief, go more fully into this testimony.

Petitioner's contention that matters were improperly submitted to the jury presents important and substantial questions of law. Petitioner asserted that, as to two of the alleged false statements, the only evidence offered by the government consisted of admissions made by him and that no conviction can rest upon uncorroborated admissions—especially where the crime charged is not an act but a statement. In other words, the government tried to prove that appellant had made a false statement at the time of application for the passport merely by showing that on an earlier occasion he had made a different statement.

This phase of the case arose from the charge that petitioner had falsely stated that he was a citizen of the United States (R. 4) and that he had not resided outside the United States (R. 5). The government showed that petitioner had stated that he was a citizen of Russia on arrival in 1914 (Ex. 19, p. 261), in his 1918 draft record (Ex. 21, p. 264)

and in a reentry application of 1932 (Ex. 13, p. 252). It showed also that he had been out of the United States from April 19th to June 5, 1932 (R. 244, 245)—but this could not be considered a “residence” abroad—and that, on his arrival in 1914, he had stated that he was born in Russia (Ex. 19, R. 261).

The Circuit Court of Appeals ruled that these admissions corroborated each other and were also corroborated by the proof that petitioner, in obtaining his passport, had relied on a forged birth record purporting to show birth in Atlantic City. But that Court also held that the rule as to admissions had no application where the admissions relied on were made before the crime charged, rather than thereafter.

Jurisdiction

This Court has jurisdiction under Judicial Code § 240 Subdivision “A”. The application is timely since the decision of the Circuit Court of Appeals was rendered on July 9, 1940. No petition for rehearing was made.

Opinion of the Court Below

The opinion of the Circuit Court of Appeals for the Second Circuit has not been officially reported. It appears at pages 296-301 of the record.

Questions Presented

1. One issue here presented is the question involved in *Browder v. United States*, in which an application for certiorari is now pending, namely the interpretation of United States Code Title 22 § 220, never heretofore considered, whether the presentation of a passport to an immigration

officer upon landing in New York is a use within the meaning of that statute.

2. Another issue is whether a conviction for use of a passport can be upheld when the only witness of such alleged use had no independent recollection of the presentation of the passport and testified that the records on which he relied did not necessarily show a use of the passport.

3. The case also presents the question whether a conviction can be had on evidence of uncorroborated admissions made before the crime charged, especially ~~where the crime charged was a false statement~~ and each alleged admission was merely a different statement from the corresponding later one.

4. Finally, the case presents the question of the extent of the evidence required to corroborate admissions.

Reasons Relied Upon for the Allowance of the Writ

1. There is here presented for decision an important question of federal law which has not been, but should be, settled by this Court. Whether the word "use" in Title 22 § 220 must be literally construed so as to apply to every possible display of a passport or should be restricted to uses of a passport *qua* passport—*i.e.* in connection with travel *from*, rather than *to*, the United States—is an important and undetermined question.

2. The second question urged by petitioner raises an important question with regard to the sufficiency of evidence on which the guidance of this Court will be of benefit to all inferior federal courts.

3. The Circuit Court of Appeals for the Second Circuit has decided an important question of federal law in a way which conflicts with decisions of other Circuits, notably those of the Ninth Circuit in *Duncan v. United States*, 68 F. 2d 136 and *Gordnier v. United States*, 261 Fed. 910. In these cases the well established rule was followed, that a conviction may not rest on admissions alone. In the case at bar, for the first time, a qualification has been written into that rule that it applies only to admissions made *after* the commission of the crime. No such limitation has heretofore been stated in any decided case—and it is contrary to the holding in the two cases cited, as expressly conceded by the Circuit Court of Appeals here.

4. The Circuit Court of Appeals for the Second Circuit has decided an important question of federal law in a way which conflicts with decisions of other Circuits, notably that of the Court of Appeals for the District of Columbia in *Forte v. United States*, 94 F. 2d 236. In that case the well established rule was followed that evidence relied on as corroborative of admissions must reach every essential element of the crime. In the case at bar it was held that corroborative evidence was sufficient if it but "fortified" the admission. The Circuit Court in the case at bar expressly stated its refusal to follow the *Forte* case. Moreover, the decision of the Circuit Court of Appeals on this aspect of the case is directly in conflict also with the decision in the *Duncan* case, *supra*.

WHEREFORE, it is respectfully prayed that a writ of certiorari be issued out of the seal of this Court directed to the United States Circuit Court of Appeals for the Second Circuit commanding that Court to certify and send to this Court for its review and determination the full and complete transcript of the record and all proceedings in the case at bar, and it is further prayed that the order of the said Circuit Court of Appeals for the Second Circuit affirming the judgment of conviction of the District Court for the Southern District of New York be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as this Honorable Court may deem just and proper, and your petitioner will ever pray.

August 7, 1940.

WELWEL WARSZOWER,
Petitioner.

By

OSMOND K. FRAENKEL,
EDWARD I. ARONOW,
Counsel for Petitioner.

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Supreme Court of the United States

WELWEL WARSZOWER, alias "Robert
William Wiener," etc.,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

BRIEF FOR PETITIONER

The facts and issues have been stated in the foregoing petition. They will be elaborated in the discussion which follows to the extent thought helpful.

POINT I.

The interpretation of Title 22 §220 presents an important question which should be settled by this Court.

Petitioner was indicted for violation of Title 22 § 220 in that he "used" a passport alleged to have been fraudulently obtained by showing it to an immigration officer at the port of New York in order to qualify as an American citizen (R. 5). By motion duly made at the appropriate stages of the trial (R. 196-198, 207), adverse rulings on which were excepted to (R. 198, 207) and assigned as

error (Ass. 4, 11, 19, 23, R. 283-7), petitioner challenged the interpretation of the statute on which the indictment rested. He contended that since no passport was required by statute for reentry into the United States and passports are issued only to facilitate travel abroad, the employment of the passport for the purposes indicated here was not a "use" within the intent of the statute. In essence the argument is that only use *qua* passport was contemplated by Congress; that the "use" here was no more such use *qua* passport than if the document had been shown to a bank teller to identify the person described.

In this respect the case at bar is identical with the *Browder* case and the Circuit Court of Appeals disposed of this phase of the case merely by reference to its opinion in that case handed down a few weeks earlier. Since the arguments underlying petitioner's contention have been fully elaborated in the petition and brief submitted to this Court in that case nothing would be gained by repetition here.

POINT II.

The issue raised by the challenge of the sufficiency of the evidence of use warrants review by this Court.

We recognize that ordinarily this Court will not review a decision of a Circuit Court on the sufficiency of the evidence—at least where no constitutional issue is involved. We believe, however, that the circumstances in this case are sufficiently unusual to justify a departure from that practice.

Here the government relied on but a single witness, the immigration inspector Faire. He expressly said that he had no independent recollection of the arrival of petitioner (R. 53). Therefore his testimony concerning the presentation of a passport by petitioner on his arrival—the vital fact to be proved—depended on his reconstruction of the event from his general practice, being aided by certain documents. In effect the evidence was therefore entirely circumstantial. It is petitioner's contention that a fair and impartial scrutiny of all the testimony necessitates the conclusion that the testimony did not exclude the hypothesis of innocence. It left open the hypothesis that petitioner presented some document other than a passport as identification. Consequently proof of guilt beyond a reasonable doubt was lacking and petitioner's motions for a directed verdict on this express ground (R. 186-196, 207) should have been granted. Exceptions to these rulings (R. 196, 207) were appropriately preserved (Ass. 5-10, 24, R. 284, 288).

The law on the subject is clear and uniformly adopted. Some recent applications may be found in *Nosowitz v. United States*, 282 Fed. 575; *Romano v. United States*, 9 F. 2nd 522; *United States v. McNaugh*, 42 F. 2nd 835; *Stone v. United States*, 47 F. 2nd 202; *United States v. Park Ave. Pharmacy*, 56 F. 2nd 753; *United States v. Ruffino*, 67 F. 2nd 440; *United States v. Buchalter*, 88 F. 2nd 625; *United States v. Silva*, 109 F. 2nd 531. See also *Rivera v. United States*, 57 F. 2nd 816 (1st Circuit), *Neal v. United States*, 102 Fed. 2nd 643 (8th Circuit) and *Boatright v. United States*, 105 F. 2nd 737 (7th Circuit).

That this case falls within the rule follows from a close analysis of the testimony. Mr. Faire testified that the

presence of Mr. Wiener's name on Government's Exhibit 6, the manifest of the S. S. Normandie (R. 243) indicated that he was admitted to the United States as an American citizen (R. 53). The manifest indicated also that he was born on September 5, 1896 in Atlantic City, New Jersey (R. 53). There were check marks against the names of all the persons on that list (R. 53). Mr. Faire testified that he made the check marks (R. 58).

After stating that he had examined a great number of persons on incoming passenger ships, Mr. Faire said that he had no independent recollection of the arrival of defendant (R. 53). He said:

"Q. Do you have any independent recollection of the arrival of this particular individual, Robert Wiener? A. No, I don't."

He was then asked the following questions:

"Q. Can you state from looking at the manifest, Mr. Faire, whether or not the passport of the individual Robert Wiener was presented to you? A. Yes, sir, I can.

"Q. On what do you base your statement? A. The number of the passport, No. 332207, is entered on the manifest and it is my invariable practice when the number of the passport appears on the manifest to ask for that passport and have it shown to me" (R. 53).

On cross-examination Mr. Faire said that an American citizen did not need a passport in order to enter, that he could use anything which would satisfy the inspector as to his identity as an American citizen (R. 56). He might present a birth certificate (R. 56, cf. 103). Then Mr. Faire said:

"Q. Any proof that would satisfy you of his American birth would pass him into the country as an American citizen? A. That is right.

"Q. It wouldn't have to be a passport? A. No.

"Q. Did you make any writing on the list of names as to what the people showed you yourself? A. No, I did not" (R. 56).

On re-direct examination the witness gave an affirmative answer to the direct question whether or not defendant had presented his passport in the particular case, but on further cross-examination he explained that he based this answer only on the fact that there was a passport number on the manifest (R. 57).

There then followed a colloquy between the Court and the witness which is reproduced in full:

"The Court: * * * Do you mark on that manifest when a man identifies himself,—do you make any entry on the manifest when a man identifies himself as an American citizen?

"The Witness: The whole manifest is of American citizens.

"The Court: And when the man presented his passport what did you do?

"The Witness: That check mark shows he was admitted as a United States citizen.

"The Court: On a passport?

"The Witness: Not necessarily.

"The Court: Can you tell us whether he had a passport?

"The Witness: From the fact the number of the passport appears there.

"Q. And you checked—

"Mr. Fowler: That is objected to.

"Q. Did you check the information on the manifest with information in the passport? A. That is correct" (R. 58).

The substance of the testimony, therefore, is that the witness, having no recollection of the incident, concludes that a passport was shown in the particular instance only because there was a number on the list and he had made a check against the name. The witness, however, admitted that means of identification other than a passport might have been produced, that in such a case there would also be a check against the name without any specific notation of the nature of the other means of identification. Finally, when pressed by the Court, the witness said that the check mark indicated only that the person was admitted as a United States citizen and not necessarily that he was admitted on a passport.

In considering this point the Circuit Court stressed the witnesses' repeated statements "that the entry of the passport number on the manifest enabled him to say with assurance that he had been shown the passport" (R. 299). The difficulty with the Court's paraphrase of the testimony is that it leaves out significant portions of it. It is our contention that the testimony must be considered as a whole and that so considered it lacks the degree of proof essential in a criminal case. This becomes evident when the entire manifest in evidence is examined (R. 243). The page there shown consists entirely of American citizens (R. 58). In each instance there was a passport number; in each instance a check. The significant fact is that the witness Faire had not put any number on the list (R. 56, 57), but only the check (R. 58). The purpose of the check was to show that the person named was admitted as an American citizen (R. 58). Citizenship is determined by the document presented as identification—and the witness testified that it did not have to be a passport (R. 56). Therefore

if every person on that list had shown a passport the witness necessarily must have answered in the affirmative the question put by the Court that the check mark indicated that the person had been admitted on a passport. Yet this the witness was unwilling to do. His answer was "not necessarily" (R. 58). In other words, there was a possibility that one or more of the persons on the list had not shown a passport, despite the fact that each name was accompanied by a passport number. And since the witness had no recollection of petitioner (R. 53) it might have been petitioner who had shown something else to identify himself. And no testimony about "invariable practice" (R. 53) can overcome that "not necessarily."

The case is similar to *People v. Weiseman*, 280 N. Y. 385. In that case the Court of Appeals of the State of New York by Chief Judge Crane reversed a conviction and dismissed the indictment because no proper inference of guilt could be drawn. The charge there was escaping from custody while a prisoner. The evidence of the People indicated that defendant might have slipped out while a policeman took out other prisoners. However, the People's testimony also established that each of the persons who went out with this policeman was specifically accounted for. The Court pointed out that the inference which might have been permissible from the first part of the testimony was contradicted by the second part of the testimony and that under such circumstances defendant's guilt had not been proved beyond a reasonable doubt. Chief Judge Crane said at page 389:

"The People's case is made up on the inference that Weiseman must have slipped out when Devine took out his nine prisoners. This might have been a fair inference if it were not for the fact that these same People's witnesses contradict it."

So in the case at bar the first part of Faire's testimony is contradicted by the second part of it. No proper inference of guilt is, therefore, permissible.

POINT III.

The refusal of the Circuit Court of Appeals for the Second Circuit to follow decisions in other Circuits on the necessity for corroboration of admissions requires review by this Court.

The Circuit Court in the case at bar expressly refused to follow the Ninth Circuit's decisions in *Gordnier v. United States*, 261 F. 910 and *Duncan v. United States*, 68 F. 2nd 136 (R. 300).

The question arose because of petitioner's contention that issues had been submitted to the jury without any evidence to sustain the government's contention other than admissions by petitioner. The government charged that petitioner had made four false statements (R. 4, 5): that his name was Wiener; that he was an American citizen; that he was born in Atlantic City, New Jersey, on a specified date; that he had never resided outside the United States. At the trial petitioner moved separately to exclude from the jury's consideration each of these four statements (R. 198-205, 207). Exceptions were noted to the Court's refusal (R. 199-207) and error duly assigned (Ass. 12-16, R. 285, 286). Since the Trial Court twice charged the jury that it could convict if it found any one of the statements false (R. 217, 224) there can be no doubt that error was committed if the jury was improperly permitted to consider any one of these four statements.

In support of that proposition of law petitioner, in the Circuit Court, relied on *Nash v. United States*, 229 U. S. 373; *Stromberg v. California*, 283 U. S. 359; *Patterson v. United States*, 222 Fed. 599; *Loomis v. United States*, 61 F. 2nd 653. The government did not take issue with this contention and the Circuit Court assumed the rule to be applicable—petitioner having taken the necessary appropriate steps at the trial, Cf. *United States v. Rebhuhn*, 109 F. 2nd 512, 515; *United States v. Mascuch*, 111 F. 2nd 602.

We come, therefore, to the basic problem. Was there sufficient evidence to go to the jury as to each one of the four statements alleged to have been false? Petitioner contends that as to two of them there was not, since the only evidence consisted of his own declarations. The government to prove non-citizenship relied solely on statements made by defendant reproduced in the manifest of S. S. Haverford of 1914 (Ex. 19, p. 261) in the draft record of 1918 (Ex. 21, p. 264) and in the reentry application of 1932 (Ex. 13, p. 252)—statements which indicated birth in Russia. Thus the government sought to establish that the 1936 passport statement of American birth was false not by proof that the fact was otherwise, not even by a declaration of petitioner's that his 1936 statement was false, but merely by showing that petitioner had previously made different statements. Petitioner is shown to have made two inconsistent statements, but there is no proof as to which is false.

So, in attempted proof of residence abroad the government relied only on the same Haverford manifest (Ex. 19, R. 261). The brief absence in 1932, from April 19th to June 5th (R. 245, 244) can not be considered a "residence" (*Transatlantica Italiana v. Elting*, 74 F. 2nd 732; *In re Carnera*, 6 F. Supp. 267).

To be sure the government argues that there was independent corroboration of its claims and the Circuit Court appears to have accepted that argument (R. 300, 301), in so doing again conflicting with other courts—as we shall show hereafter. But since its main reliance was on the applicable rule of law we believe a square issue has been presented for disposition by this Court.

In the Circuit Court petitioner contended that the general rule precluding conviction on admissions alone applied to this case, citing, among others, the two cases above referred to which the Circuit Court refused to follow. The government did not challenge the rule contended for, claiming only that there had been corroboration. This claim rested in part on the matters adverted to by the Circuit Court, to be discussed hereafter, in part on the contention that proof of the use of the passport was corroboration of one element of the crime and thus sufficient. This contention on the part of the government was not mentioned by the Circuit Court.

Instead the Circuit Court laid down a new rule of law, namely, that a conviction could rest on the unsupported declaration of a defendant made before the commission of the crime. In justification of that doctrine the Circuit Court argued that the rule contended for by petitioner had arisen as protection against an untrue confession, "coerced or psychopathic". Therefore, said the Court, the policy of the rule did not apply to declarations made before the commission of the offense.

The distinction thus made is an interesting one. There is no doubt that a higher probative value should be given to declarations made without motive to falsify and, to some extent, the law has taken cognizance of this criterion. Various exceptions to the hearsay rule, such as the law of

dying declarations, evidently rest on such psychological considerations. But in the field of criminal law the requirement of independent proof of the *corpus delicti* goes beyond the narrow grounds of confessions obtained by coercion or because of the accused's psychopathic disposition. It is entwined with the presumption of innocence (*Clayton v. United States*, 284 F. 537). It rests on the evident fact that people often tell untruths and that convictions resting upon uncorroborated statements more often are unjust than otherwise. That, in a particular case, the declarations may have inherent plausibility should not affect the general rule.* Nor is there reason to expect that convictions will thus be rendered impossible, for generally a diligent prosecutor can obtain corroboration of the facts.

Let us suppose a prosecution for bigamy in which the fact of the first marriage is established only by a declaration made by the defendant before the second marriage. In the absence of some proof that a marriage had actually been consummated, the defendant's statement should not be sufficient, for all such a statement amounts to is a belief that he had been married or a desire that others should so believe. So in the case at bar the earlier statements by petitioner amount to nothing more than his belief that he had been born in Russia. Surely he cannot be sent to jail because at a later time he had a different belief and expressed it.

In a number of cases statements made before the commission of the crime have been held insufficient in the ab-

*Indeed no relaxation of the ordinary rule with regard to confessions is permitted merely because the circumstances indicate that the confession was a genuine one—that merely affects the admissibility, not the sufficiency of the confession.

sence of corroboration of the *corpus delicti*: *People v. Lambert*, 5 Mich. 349 (bigamy); *People v. Isham*, 109 Mich. 72 (adultery); *Hiler v. People*, 156 Ill. 511 (bigamy); *Green v. State*, 21 Fla. 403 (bigamy); *People v. Simonsen*, 107 Cal. 345 (false pretenses).

The true nature of the problem was considered by the Circuit Court of Appeals for the Ninth Circuit in the *Duncan* case, *supra*. In that case defendant was convicted on three counts: for false statements in obtaining a passport, which included a statement of birth at a particular time and place; for falsely representing himself as a United States citizen; for perjury in making the statements in the passport. The Circuit Court upheld the conviction on the first and third counts because there was independent evidence that defendant had not been born at the time and place indicated—evidence stronger indeed than similar evidence in the case at bar (see R. 130, 133) because it was shown in the *Duncan* case that defendant had a part in the falsification of the birth record. But the Court reversed the conviction on the second count because there was no independent evidence of foreign birth. There, as here, the government relied entirely on declarations made by the defendant before the commission of the crime—on the manifest of the original entry, and on applications for life insurance, for a marriage license and for naturalization.

In the *Gordnier* case the same Court reversed a conviction for failure to register under the draft. The only proof that defendant was of the required age consisted of declarations concerning his age which defendant had made on earlier occasions. Such declarations, being but expressions by defendant of his own belief, could not form the basis of conviction of crime. Before sending a man to jail

the government should establish that the earlier statement attributed to defendant really represents the facts.

That these decisions in the Ninth Circuit are in direct conflict with the decision below is evident and was recognized by the Circuit Court of Appeals herein (R. 300).

Support for the view that an accused may not be convicted merely on his uncorroborated admissions alone, whether the admissions were made before or after the event, is found in the law of perjury.

The analogy from the law of perjury is peculiarly apt in this case as the essence of that crime is false swearing, which is precisely the charge made against the defendant herein. A study of the perjury cases discloses that it is insufficient to convict an accused of perjury merely by showing that he made two or more contradictory statements.

The general rule in the United States in perjury cases is stated by Wharton, as follows:

"When the defendant has made two distinct statements under oath, one directly the reverse of the other, it is not enough to produce the one in evidence to prove the other to be false." (Wharton's Criminal Law (12th Ed.) Vo. 2, Sec. 1583.)

In all the perjury cases applying this rule, not one makes the distinction made by the Circuit Court in the instant case, between contradictory statements or admissions made before the event and those made after the event. On the contrary, there have been many reversals of conviction made upon contradictory statements or admissions alone, although they were made prior to the alleged criminal act.

Thus, in *People v. McClintic*, 193 Mich. 589, 160 N. W. 461, where the defendant testified twice under oath, con-

tradicting himself the second time, the Court reversed a conviction of perjury based on the later testimony, saying (160 N. W. at p. 464):

"We think that it should be held that a conviction for perjury cannot be sustained merely upon contradictory sworn statements of the defendant, but the prosecution must prove which of the two statements is false, and must show that statement to be false by other evidence than the contradictory statement."

In *State v. Carter*, 315 Mo. 215, 285 S. W. 971, a conviction of perjury was likewise reversed, where the sole proof of falsity was demonstrated by prior inconsistent statements of the accused. The Court said (28 S. W. at p. 971):

"* * * It was not sufficient to prove only that appellant made statements concerning such acts and admissions contradictory to his testimony when sworn and examined as a witness in respect thereto."

In *Clayton v. United States*, 284 F. 537, the defendant made certain statements to the police and thereafter contradicted those statements when testifying before the Grand Jury. The Court reversed the conviction, saying (at p. 539):

"In prosecutions for perjury it has long been settled that not only must the guilt of the accused be established beyond reasonable doubt, as in other criminal cases, but that the falsity of the matter sworn to by him must be proved by direct and positive evidence."

In *Paytes v. State*, 137 Tenn. 129, 191 S. W. 975, the defendant was convicted of perjury for testifying at a trial contrary to his prior testimony before the Grand Jury. The conviction was reversed, the Court stating the rule as follows (191 S. W. at p. 975):

"But by a decided weight of authority the Courts of this Country declare the rule that in order to sustain a conviction for perjury it is not sufficient to prove merely that the accused at different times made, or testified to, two statements that cannot be reconciled; and that there must be some additional testimony as to the falsity of the matter in respect of which perjury is averred."

Other cases in accord are:

People v. Chadwick, 4 Cal. App. 63;

Richardson v. State, 45 Ohio, App. 46, 186 N. E. 510;

Billingsley v. State, 49 Texas Cr. 620, 95 S. W. 520.

It is obvious, therefore, that the Circuit Court, in the instant case, errs when, although accepting the general rule requiring the corroboration of extrajudicial admissions, it limits the scope of the rule to admissions made after the event. No other court in the United States has ever made that distinction.

The weakness of that distinction may be further shown if we assume, for the moment, that the defendant had made the alleged false statements concerning his citizenship and residence while testifying in court instead of in a passport application. Under the rule laid down unanimously by the cases above cited, he could not be convicted of perjury

merely by proving that he had made prior inconsistent statements. Independent evidence of the falsity or corpus delicti of the later statements would be necessary.

Yet, in the instant case, the Court departed from the universally recognized rule and held that independent proof was unnecessary. Surely, this departure cannot be justified because the defendant was not charged with perjury in a court of law. The essence of the defendant's alleged crime and the essence of the crime of perjury is false swearing, and the rule governing one is equally applicable to the other.

To sustain the conviction of the defendant on contradictory statements made by him, without requiring independent evidence of the corpus delicti, is to depart from our long established traditions of Anglo-American law, which require, in every case, that there be proof that a crime was actually committed, outside of the extrajudicial statements of the defendant alone.

We believe the decision in the case at bar is in conflict with the sound rule, is indeed the first expression of a rule never even suggested before. We have been unable to find any other cases, state or federal, which throw light on the problem. Review by this Court is, therefore, essential lest the uncertainty created by the decision below result in confusion.

POINT IV.

The decision of the Circuit Court as to what constitutes corroboration requires review by this Court.

As we have already pointed out, petitioner contends that certain issues had been improperly submitted to the jury because the evidence consisted only of admissions. The

Circuit Court overruled this contention in part by holding that there had been corroboration (R. 300). In so doing it stated that it preferred the rule it had laid down many years ago in *Daeché v. United States*, 250 F. 566, to the rule recently laid down by the Court of Appeals for the District of Columbia in *Forte v. United States*, 94 F. 2nd 236. In that case the Court pointed out that the corroboration had to be of every essential element of the crime other than the identity of the wrongdoer. In the case at bar evidence was accepted as corroborative which merely "fortified" the truth of the admissions. The difference between the two rules is fundamental and requires resolution by this Court.

Moreover, there is conflict between the decision in the case at bar and that in the *Duncan* case *supra*. For in both cases the evidence was of similar character. In both the manifest at the time of first entry indicated foreign birth and nationality; in both defendant presented a certificate of native birth and the evidence showed that the record behind the certificate had been forged; in both defendant had repeatedly declared that he was an alien. These items were declared corroboration in the case at bar; they were rejected as corroboration in the *Duncan* case. To be sure there was in the case at bar some very vague proof that petitioner had not applied for naturalization (R. 82, 83); on the other hand in the *Duncan* case, but not in this, defendant was proved to have been a party to the forgery of the native birth record—and in that case there actually was proof of foreign birth.

The difficulty with the argument of the Circuit Court in the case at bar arises from a failure separately to consider the various elements of the crime charged against him. Thus in discussing corroboration the Court linked

together the declarations "of name, alienage, foreign birth and residence abroad." Of course, there was corroboration of petitioner's use of two names and he has never contended otherwise. And petitioner did not, in the Circuit Court, complain of the submission to the jury of the issue of his place of birth. But on the two relevant issues, alienage and residence abroad, we submit there was no corroboration.

The Circuit Court referred in the general discussion to three items of proof: the 1914 manifest; the forged Atlantic City record; the testimony about naturalization. The second and third of these could have no possible bearing on the issue of residence abroad and the first is not independent corroboration at all, since the manifest was, for all that appears, based only on the declarations of petitioner. Indeed counsel for the government so conceded at the trial (R. 202). Evidence of this kind was expressly held not corroboration in the *Duncan* case, and properly so. Thus it appears that there was no corroboration whatever of petitioner's declarations with respect to at least one of the issues submitted to the jury.

And with respect to the other, the question of alienage, the supposed corroboration is wholly insufficient. The manifest, we submit, may not be considered, being but an admission at second hand. The forged Atlantic City record is, under the *Duncan* case, insufficient, and on good logic. It but excludes one possible native birth and in no way even indicates foreign birth, much less foreign citizenship. Nor does the vague proof that petitioner had not applied for naturalization corroborate his declarations of foreign birth, since a failure to apply for naturalization is consistent, rather than inconsistent with the later claim of native birth.

While, in the *Duncan* case, this proof was lacking, and its absence commented on; in that case there was proof of foreign birth; therefore proof that there had been no naturalization might establish non-citizenship. But here the evidence outside the declarations adds nothing; it does not even "fortify."

CONCLUSION

It is respectfully submitted that review should be had by this Court to clarify the meaning of Title 22, § 220, to reconcile differences between the Court below and other federal appellate courts and to establish the proper rule governing the effect of declarations made by an accused and the extent to which they must be corroborated.

Respectfully submitted,

OSMOND K. FRAENKEL,
EDWARD I. ARONOW,
Counsel for Petitioner.

United States Code, Title 22, Section 220:

"False Statement in application: use of passport obtained by false statement: penalty. Whoever shall wilfully and knowingly make any false statement in an application for passport with intent to induce or secure the issuance of a passport under the authority of the United States, contrary to the laws regulating the issuance of passports or the rules prescribed pursuant to such laws, or whoever shall wilfully and knowingly use or attempt to use, or furnish to another for use, any passport the issue of which was secured in any way by reason of any false statement, shall be fined not more than \$2,000 or imprisoned not more than five years or both. (June 15, 1917, c. 30, Title IX, Section 2, 40 Stat. 227.)"

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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

No. 338

WELWEL WARSZOWER,
alias "Robert William Wiener," etc.,
Petitioner,
against

UNITED STATES OF AMERICA,
Respondent.

**REPLY BRIEF IN SUPPORT OF PETITION
FOR WRIT OF CERTIORARI**

OSMOND K. FRAENKEL,
EDWARD I. ARONOW,
Counsel for Petitioner.

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Supreme Court of the United States

WELWEL WARSZOWER,
alias "Robert William Wiener," etc.,
Petitioner,

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No. 338

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Solicitor General in his brief in opposition to the petition herein contends (pp. 6 and 7) that the conflict between the decision below and the decisions in the Ninth Circuit, to which attention was called on page 16 of petitioner's brief, need not be considered by this Court because the question of the insufficiency of the evidence was not properly raised at the trial. This is the first time that any such contention has been made on the part of the Government. In the Circuit Court of Appeals appellant contended that reversal must follow whenever a jury is permitted to base a finding of guilty upon one or more elements of a crime when there was not sufficient evidence to permit the jury to consider one or more of those elements and a separate request for the withdrawal of each element was refused. The Government in no way disputed that contention. Moreover, on the argument in the Circuit Court of Appeals Judge Learned Hand, presiding, acquiesced in the statement of petitioner's counsel on this subject. The opinion of the Circuit Court of

Appeals in no way questions the right of petitioner to raise this contention. This is all the more significant because that same Court had in recent cases such as *United States v. Dilliard*, 101 F. 2nd 829; *United States v. Rebhuhn*, 109 F. 2nd 512; *United States v. Mascuch*, 111 F. 2nd 602 and *United States v. Smith*, 112 F. 2nd 83, rejected similar arguments because trial counsel had not in those cases adequately presented the issue at the trial.

The essential difference between that group of cases and the case at bar is that in those cases there were merely motions to dismiss separate counts, whereas in the case at bar there were specific and separate motions to withhold from the consideration of the jury each one of the four alleged false statements, all of which combined constituted but one count. In connection with statement No. 2, which was the allegation of citizenship, counsel made the motion on the express ground "that all the evidence introduced by the Government is in the nature of admissions * * * the important thing is the failure to introduce independent corroborative proof" (R. 199) and the Court's attention was particularly called to the *Duncan* case, 68 F. 2nd 136. It is clear, therefore, that as to this alleged ground of the prosecution's case the attention of the Trial Court was specifically called to the point raised by the petitioner in the Circuit Court of Appeals and urged upon this Court. (See also R. 200.) It will not do, therefore, for the Solicitor General now to say (p. 7) that the petitioner should have requested that only those statements be submitted to the jury which had been properly proved false. That is just what petitioner did at the trial, by asking that there be withheld from the jury the consideration of the statements which petitioner contended had not been properly proved false.

Likewise, with regard to the fourth statement, the one dealing with residence abroad (see R. 203), a similar motion was made on the ground that there was a failure of corpus proof "and admissions standing on their own here are not sufficient to let the matter go to the jury" (R. 205).

Petitioner preserved all his rights by excepting to the denial of both these motions (R. 200, 205). It would have been impertinent after such rulings to have excepted to the Court's charge that the jury might base a conviction upon any one of the four statements alone. Surely if the Trial Court was right in submitting all four statements to the jury then its instruction was right that the jury could find on the basis of any one of them. The error of the Trial Court was not in the charge, but in the denial of the motions to withdraw these two statements from consideration by the jury. The instruction merely made prejudicial to petitioner the error of those rulings. That is clearly established by the cases cited in the original brief on page 17.

These cases hold that prejudice will be presumed where a jury is allowed to base a verdict upon evidence improperly before it, since no one can say upon which phase of the case the verdict of the jury was based. (See R. 227.)

The Solicitor General further (p. 8) suggests that petitioner has conceded that the falsity of two of the statements was established. Petitioner has conceded only that sufficient proof was produced with regard to two of these statements to permit their submission to the jury. It still remains uncertain how the jury arrived at its verdict.

The cases cited (p. 8) throw no light whatever on this problem because in no one of these cases was a motion made to remove from the consideration of the jury each

one of the elements of the crime which it was later claimed should not have been submitted.

With regard to the second contention, namely, that there was additional corroborative, evidence we can add little to what has already been said in our original brief. We do insist, however, that the *Duncan* case cannot be disposed of in the cavalier manner attempted (p. 10). The reason why the Court in that case commented upon the absence of proof with regard to an application for citizenship was the existence of proof of foreign birth. Obviously, when it has been proved that a defendant was born abroad non-citizenship is a fair inference when it is also established that he never applied to become a citizen. But in the case at bar there was no proof whatever of foreign birth. Consequently evidence with regard to the failure to obtain citizenship is wholly irrelevant and adds nothing whatever to the Government's proof.

The *Duncan* case still remains clear authority for the proposition that admissions alone cannot be used as a basis of conviction and that corroboration may not be drawn from other admissions. Finally, in the *Duncan* case there was not only proof, as here, that the claimed American birth was based on an alleged false entry, but as there is not here, proof that defendant was implicated in the forgery. Nevertheless the Court held there was no corroboration.

Finally, the Solicitor General seeks to support the conviction on the theory that the use of the passport was directly proved (p. 10)—a theory advanced in the Circuit Court but not accepted by that Court. On this point, moreover, the *Forte* case, 94 F. 2nd 236, is directly contrary authority.

It is respectfully submitted, therefore, that the conflict pointed out in our main brief remains, both as to the rule with regard to admissions and as to the extent of the corroboration required.

Respectfully submitted,

OSMOND K. FRAENKEL,
EDWARD I. ARONOW,
Counsel for Petitioner.

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CHARLES ELMORE GROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM 1940

No. 338

WELWEL WARSZOWER, alias "Robert William
Wiener," etc.,

Petitioner,

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BRIEF FOR PETITIONER

✓ OSMOND K. FRAENKEL,
✓ EDWARD I. ARONOW,
Counsel for Petitioner.

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Supreme Court of the United States

OCTOBER TERM 1940

WELWEL WARSZOWER, alias "Robert
William Wiener," etc.,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

No. 338

BRIEF FOR PETITIONER

A writ of certiorari has issued to review an order of the United States Circuit Court of Appeals for the Second Circuit affirming a judgment of the District Court for the Southern District of New York convicting petitioner of a violation of United States Code Title 22 § 220.

Summary Statement

Petitioner was indicted for the use of a passport obtained as the result of statements alleged to be false (R. 3). Petitioner contends that the use charged—presentation to an immigration inspector upon arrival in New York—was not a use in violation of the statute; that the government failed to prove any presentation of the passport; that the government failed to establish the falsity of at least two of the statements alleged to have been false, thus requiring re-

versal since petitioner separately moved to exclude each of these statements from consideration by the jury (R. 174-179, 180) and the trial judge charged that conviction could result if any of the statements was false (R. 189).

1. Petitioner's contention that the presentation of a passport to an immigration inspector upon arrival is not the kind of use contemplated by the statute rests on similar considerations to those advanced by the defense in *United States v. Browder*, 113 F. 2nd 97, No. 287 of this Term, and the Circuit Court in the case at bar rested entirely on that decision in this regard.

2. Petitioner's contention that there was no proof of the presentation of the passport requires an analysis of the evidence.

The only evidence of the presentation of the passport was that of Inspector Faire. He testified that he examined incoming passengers on the S. S. Normandie on September 30, 1937 (R. 45). He had no recollection of petitioner (R. 46). He was shown a portion of the ship's manifest (Exhibit 6, p. 211), which, it was assumed, had been prepared by the purser (R. 42, 49), but which had been signed by the witness (R. 45). The purser did not testify. This manifest listed the names of various persons who were admitted as American citizens (R. 41). It showed numbers opposite the names (R. 41). Opposite the name of petitioner was the number 332207 (R. 211). This was the number of the passport issued on the application made by petitioner (Exhibit 1, p. 206, R. 23). Faire had placed check marks opposite each name (R. 45, 51), but there were no checks against the numbers (R. 211).

Faire testified on direct examination that petitioner had presented his passport, the witness giving as his reason for so testifying that it was his practice to ask for a passport whenever a number appeared on the list opposite the passenger's name (R. 46). He assumed, evidently, that a passport was in fact produced. On cross-examination, however, he said that it was not necessary for an incoming passenger to show a passport to establish his citizenship and thus his right to enter (R. 48); a birth certificate, or any other satisfactory means of identification, would suffice (R. 48, 49 *cf.* 91). And Faire expressly said that he did not indicate on the manifest the nature of the identification produced (R. 49). When questioned by the Court as to the significance of the check mark, Faire said that it did not necessarily indicate that a passport had been shown (R. 50). Thus proof that petitioner had actually presented a passport was lacking. We shall, hereafter, go more fully into this testimony.

3. ~~Petitioner's contention~~ that matters were improperly submitted to the jury presents important and substantial questions of law. Petitioner asserted that, as to two of the alleged false statements, the only evidence offered by the government consisted of admissions made by him and that no conviction can rest upon uncorroborated admissions—especially where the crime charged is not an act but a statement. In other words, the government tried to prove that petitioner had made a false statement at the time of application for the passport merely by showing that on an earlier occasion he had made a different statement.

This phase of the case arose from the charge that petitioner had falsely stated that he was a citizen of the United States (R. 3) and that he had not resided outside the United

States (R. 3). The government showed that petitioner had stated that he was a citizen of Russia on arrival in 1914 (Ex. 19, p. 229), in his 1918 registration record (Ex. 21, p. 232) and in a reentry application of 1932 (Ex. 13, p. 220). The government showed also that he had been out of the United States from April 19th to June 5, 1932 (R. 212-213)—but this short absence can surely not be considered a “residence” abroad—and that, when he came to Philadelphia in 1914, he stated that he was born in Russia (Ex. 19, R. 229).

The Circuit Court of Appeals ruled that these admissions corroborated each other and were also corroborated by evidence of a forged birth record purporting to show birth in Atlantic City (R. 259). But the Court primarily held that the rule as to admissions had no application where the admissions relied on were made before the crime charged, rather than thereafter (R. 258, 259).

Jurisdiction

This Court has jurisdiction under Judicial Code § 240 Subdivision “A”.

Opinion of the Court Below

The opinion of the Circuit Court of Appeals for the Second Circuit is officially reported at 113 Fed. 2nd 100.

Questions Presented

1. One issue here presented is the question involved in *Browder v. United States*, namely the interpretation of United States Code Title 22 § 220, never heretofore considered, whether the presentation of a passport to an immi-

gration officer upon landing in New York is a use within the meaning of that statute.

2. Another issue is whether a conviction for use of a passport can be upheld when the only witness of such alleged use had no independent recollection of the presentation of the passport and testified that the records on which he relied did not necessarily show a use of the passport.

3. The case also presents the question whether a conviction can be had on evidence of uncorroborated admissions made before the crime charged, especially where the crime charged was a false statement and each alleged admission was merely a different statement from the corresponding later one.

4. Finally, the case presents the question whether there was any corroboration of the admissions.

POINT I

The "use" of the passport relied upon by the Government constituted no violation of Section 220, Title 22.

This issue is presented by Assignments of Error 4, 11, 19, 23 (R. 248, 249, 251). It is based on appropriate motions made at the end of the Government's case (R. 165, 172-174) and renewed at the end of the entire case (R. 180). The adverse rulings were excepted to (R. 174, 181).

In the case at bar the Circuit Court of Appeals did not specifically discuss that question here presented, relying

merely on what had been decided in the *Browder* case, 113 F. 2d 97 (R. 297). While that case is now before this Court on writ of certiorari, being No. 287 of this Term, an independent discussion of the subject seems called for because in the *Browder* case counsel for petitioner have based their argument in large part upon the fact there conceded that Browder was a citizen, a fact which in the case at bar is one of the material issues. At some risk of duplication, therefore, of matter already covered in the *Browder* case, we offer the following for consideration of the Court.

The statute upon which the indictment rests was part of the so-called Espionage Act of June 15, 1917 which was entitled "An act to punish acts of interference with the foreign relations, the neutrality and the foreign commerce of the United States, to punish espionage and better to enforce the criminal laws of the United States, and for other purposes." Title IX of this Act consists of four sections which are Sections 213, 220-222 of Title 22 of the Code. Title 22 is entitled "Foreign relations and intercourse." The first of these sections provides for the manner of issuing passports. The second section punishes the making of false statements "wilfully and knowingly" for the purpose of obtaining a passport and also—and it is this portion of the section under which this indictment is found—punishes a person who

"shall wilfully and knowingly use or attempt to use, or furnish to another for use, any passport, the issue of which was secured in any way by reason of any false statement."

The third section punishes the use of a passport issued to someone other than the person using it or the use of such a

passport in violation of the restrictions contained in it or of the rules dealing with the issuance of passports. The last section punishes the forging or mutilation of a passport or the use of an expired passport:

The meaning of the statute.

It will be noted that there is nothing in this statute which requires the use of an American passport in connection with the departure or entry into the United States of any person, whether citizen or alien. A law that did require both aliens and citizens to have passports was enacted in 1918 entitled "to prevent, in time of war, departure from or entry into the United States contrary to the public safety." Its provisions, so far as not repealed, now form Sections 223-226 of Title 22 of the Code. Section 2 of that Act, which lapsed in 1921, prohibited a citizen from either leaving or returning to the United States without a valid passport. The other sections are applicable to aliens but have nothing to do with the use of an American passport. They deal only with the necessity for an American visa on a foreign passport. In 1921 with the end of the war, all of the passport restrictions would have expired. However, Congress extended the provisions that applied to aliens (See Section 227 of Title 22.)*

*The criminal provisions of the 1918 Act, however, were not so extended. See *Flora v. Rustad*, 8 F. 2nd 335; *United States v. One Airplane*, 23 F. 2nd 500. Moreover, as to immigrants subsequent legislation has completely terminated the effect of the 1918 law. See *Johnson v. Keating*, 17 F. 2nd 50—although it has been held that the old law applies to non-immigrant alien visitors. See *United States ex rel. London v. Phelps*, 22 F. 2nd 288 and *United States ex rel. Komlos v. Trudell*, 35 F. 2nd 281.

Other regulations with regard to passports have been enacted from time to time, such as the Act of July 3, 1926, Title 22, Sections 211-a and 214-a, and the Act of May 16, 1932, Title Section. 217-a. These later statutes are not germane to the issues now before the Court.

Petitioner contends that the use made a crime by the Espionage Act is a use of the passport *qua* passport, not a use of the passport in some connection unrelated to the purposes for which a passport is issued. It has been repeatedly declared that a passport is not issued for the purpose of securing the entry of a person into the United States, but only for the purpose of fostering his travel abroad. See Borchard, Diplomatic Protection of Citizens Abroad, p. 493; Hunt, The American Passport, p. 4; Executive Regulations, issued June 7, 1911, Rule 4, continued in 1914, 1915, 1916 in 1917.

It is our contention, therefore, that Congress did not intend to make it a criminal offense for a person to use a passport in connection with his return to this country. When Congress intended to punish a person for attempting to enter by showing an invalid passport, it did so, in 1918, by express provision requiring a valid passport as condition of entry. But this legislation has not been in effect since 1921. Moreover petitioner was not prosecuted thereunder.

Nor can it be said that this argument can have no application to this petitioner because the Government contends that he is an alien. Our argument does not rest upon the citizenship or the non-citizenship of the user. It rests upon the fact that the showing of a passport for purposes of entry is not, under any provision of law or any regulation of government, a *use* of the passport. Only during the period 1918-1921 could such showing be said

to have been a use—and then only because of the express legislation. It, therefore, now makes no difference whether the person showing the passport is a citizen or not. Moreover, we submit that in the case at bar the Government has failed to prove that petitioner is not a citizen. The only evidence on the subject of his citizenship rests on his own admissions, as we have already indicated. There is no corroboration whatever of these admissions. Under such circumstances the Government has not sustained the burden cast upon it by law. This was the express ruling in *Duncan v. United States*, 68 Fed. 2nd 136, fully discussed hereafter.

It cannot reasonably be contended that Congress in this highly penal statute intended to punish as a use of a passport any display of that passport for any purpose whatever. In order to determine what Congress did have in mind it is proper to consider the purpose for which the act was passed. As appears from the meager discussion in the Congressional records, the purpose of the bill was to protect American neutrality. (See statement of Senator Overman, 65th Congressional record, First Session, p. 3439; annual report of Attorney General 1917 p. 73). This view is confirmed by the discussion preceding the enactment of the 1918 legislation (H. R. 65th Congr. 2d Sess. Report 485). That these various provisions of the passport laws were not intended to deal with the entry of persons into the United States is borne out by *Flora v. Rustad*, 8 F. 2nd 335. There Judge Lewis said (in 1925) at page 337:

"It has never been the policy of this Government to punish criminally aliens who come here in contravention of our immigration laws. Deportation

has been the remedy. A reversal of that policy ought to be based on a clear legislative declaration."*

The word "use" has been frequently construed not to apply to conduct which, though literally a use, was not within the objects of the statute in question. Thus in *Bailey v. State*, 150 Tenn. 598, a conviction was reversed based on a statute which prohibited the use of an automobile without the permission of the owner when applied to a person who, while pushing an automobile across the road, lost control of it, with resultant damage. In *People v. Ryan*, 230 App. Div. 252, suit was brought to recover a penalty for violating an act forbidding the use of a milk bottle bearing the name of a milk dealer without the permission of that dealer. The Court held that the statute in that case was intended to apply to one dealer improperly using the bottle of another, not to a consumer who accepted the milk in an improper bottle, even though he later returned the empty bottle to the dealer from whom he received it. See also *Bill v. Stewart*, 156 Mass. 308; *Martin v. Bowker*, 163 Mass. 461.

Section 220 of Title 22 was enacted to punish a use of a passport secured to enable persons to travel abroad under claim of American citizenship; there was no purpose on the part of Congress to punish the showing of a passport in this country merely as a means of identification. It can make no difference whether the passport would be so "used" for the purpose of identifying the holder in getting a check cashed at a bank, or even for getting a money

*The Act of March 4, 1929, Title 22, § 180a discussed on page 11 constituted such a reversal.

order cashed at a post office, or by showing it, as claimed in the case at bar, to an immigration inspector upon return from abroad.

Nor can it be urged by the Government that if the use of a passport for purposes of entry by an alien may not be punished under this section, then his wrongful act remains unpunished. Congress has enacted legislation which permits the punishment of any alien who obtains entry by means of a passport improperly obtained. The Act of March 4, 1929, United States Code Title 8, Section 180-a, punishes an alien who obtains entry to the United States by a wilfully false or misleading representation or the wilful concealment of a material fact. Upon proper proof that defendant in the case at bar was indeed an alien, this statute would apply to the use for the purposes of entering the United States of an American passport because if the applicant were an alien the use of the passport would constitute a wilfully false statement concerning citizenship.

Moreover, petitioner could have been prosecuted under Title 18 U. S. C. A. § 141 (Act of March 4, 1909) for falsely claiming to be a citizen if the proof justified such a charge.

It is submitted, therefore, that the Government has, in the case at bar, misconceived the provisions of law under which this petitioner could have been prosecuted, if guilty of wrongdoing. If the Government could show that he was an alien, he is subject to prosecution under Titles 8 and 18. Whether an alien or a citizen he cannot be punished under Title 22 Section 220 because the showing of the passport at the time of entry is not the use of a passport *qua* passport, is not such use as was contemplated by this highly penal statute.

The statute if construed as contended for by the Government would be unconstitutional.

We submit, moreover, that the construction contended for by petitioner here avoids an unconstitutional application of the statute. It is, of course, beyond need for argument that the word "use" found in Section 220 must be given the same meaning as the same word found in Sections 221 and 222, all three sections having been enacted at the same time. (See *Llewellyn v. Harbison*, 31 F. 2nd 740, 742; *In re Associated Gas & Electric Co.*, 11 F. Supp. 359, 365). Section 221 punishes "use" of a passport in violation of the conditions contained therein. Section 222 punishes "use" of a passport that has become void. These provisions would necessarily prohibit the use of a passport after its date of expiration. If, as contended for by the Government, the showing of a passport to obtain entry into the United States constitutes a "use" of a passport, then it becomes a penal offense for a person to show an expired, though validly obtained, passport when returning from Mexico or Canada or any other place, travel to which requires no passport at all. The showing of a passport under such circumstances is a perfectly lawful and wholly innocent act.* Congress could not possibly constitutionally punish such act. See *Stromberg v. California*, 283 U. S. 359; *deJonge v. Oregon*, 299 U. S. 353 and *Lanzetta v. New Jersey*, 306 U. S. 451. This Court should, therefore, construe the statute as contended for by petitioner in order to avoid any question of its constitutionality. See *Anniston Mfg. Co. v. Davis*, 301 U. S. 337, 351; *Chippewa Indians v. United States*, 301 U. S. 358, 376.

*And it is customary: See N. Y. Times, July 19, 1940, p. 10, col. 1.

The conclusion is thus inescapable that in order to prevent the punishment of acts wholly lawful, the statute must be so construed as to exclude from its scope the mere showing of a passport for purposes of entry into the United States. That being so, there was no use in violation of the law in the case at bar.

The Circuit Court decision in the *Browder* case.

In *United States v. Browder*, 113 F. 2nd 97, the Circuit Court of Appeals recognized that at the time the statute in question was passed it did not apply to the use of a passport for purposes of identification to facilitate entry into the United States, such use being then relatively uncommon since American citizens practically never obtained passports. The Circuit Court contended, however, that the statute could now be applied to such a use on the ground that "this application to a given state of facts may change as new things or new uses of old things come into existence." In support of this contention the Circuit Court cited *DeLima v. Bidwell*, 182 U. S. 1; *Puerto Rico v. Shell Co.*, 302 U. S. 253, and *Maxwell, Interpretation of Statutes*, 6th Ed., pp. 144, 145.

The cases are scant authority for the use made by the Circuit Court of the well accepted general rule that a statute may become applicable to things not known at the time the statute was enacted if those things are of a nature to fall within the description of the statute—as a statute which refers to weapons will cover types of weapons not yet invented when the statute was passed.

Both the cases cited deal with the status of Puerto Rico. In the *Bidwell* case the question was whether or not that island was a "foreign country" under the tariff law; in

the *Shell Company* case it was whether or not it had become a "territory" of the United States under the Sherman Anti-trust Act. In both cases the Court held that Puerto Rico, had, so far as the applicable statutes were concerned, become part of the United States. The *Bidwell* case has no real application to the problem now before the Court since the only relevant question there considered was whether it must be held that Puerto Rico continued to be foreign because it had been foreign at the time the law was enacted. This Court dealt very shortly with that argument and its decision of the same clearly has no application to the case at bar. The *Shell Company* case, although closer, because it is a holding that something came under a law which was not under it at the time of its passage, is also logically not relevant here. For there was involved in that case that extension to a species of a genus to which Maxwell refers at the very page cited by the Circuit Court of Appeals.

It is significant, however, that the statement from Maxwell which is cited follows a subheading entitled: "Beneficial Construction". The pertinent portion of the discussion follows:

"Except in some cases where a statute has fallen under the principle of excessively strict construction, the language of a statute is generally extended to new things which were not known and could not have been contemplated by the Legislature when it was passed. This occurs when the Act deals with a genus, and the thing which afterwards came into existence is a species of it."

Taking the analysis indicated by Maxwell it seems clear that the employment of a passport in order to reach a country not in existence when the law was passed would

be a "use" punishable under the law—that would be the extension of the law to a new species of the genus concerned, that genus being foreign countries. But merely because it had become convenient to employ a passport to identify the holder upon entry into the United States it cannot properly be held that such an employment of a passport is a use of the same under this law since there is nothing in the law to indicate that it was passed to punish an employment of a passport which had no relation to its essential function as passport, namely, for use in traveling in foreign countries.

Further on Maxwell, in discussing the construction of penal laws at page 477 says:

"Again, as illustrative of the rule of strict construction, it has been said that while remedial laws may extend to new things not *in esse* at the time of making the statute, penal laws may not * * *."

This, being a criminal case, the rule of strict construction must apply.

It is submitted, therefore, that nothing in the discussion by the Circuit Court of Appeals or the authorities cited by that Court justifies the application of this statute in the case at bar.

POINT II

There was no evidence to justify submission to the jury of any question of petitioner's presentation of a passport.

This issue is raised by Assignments of Error Nos. 5, 6, 7, 8, 9, 10, 24 (R. 248, 249, 251) and arises from motions made both at the end of the Government's case (R. 165-172) and at the end of the entire case (R. 180) for a directed verdict on the ground that even if the presentation of a passport to the immigration inspector on September 30, 1937 constituted a use within the statute, nevertheless, the evidence of such presentation was absent. Exceptions were noted to the rulings complained of (R. 172, 181).

Proof of the presentation of the passport was essential to the prosecution's case. A conviction arrived at without such proof would be a denial of due process. See *Fiske v. Kansas*, 274 U. S. 380; *Cantwell v. Connecticut*, 310 U. S. 296. It is necessary, therefore, for this Court to review the evidence in order to determine whether or not there was any proof of the presentation of the passport sufficient to permit the submission of the case to the jury.

Here the government relied on but a single witness, the immigration inspector Faire. He expressly said that he had no independent recollection of the arrival of petitioner (R. 46). Therefore his testimony concerning the alleged presentation of a passport by petitioner on his arrival—the vital fact to be proved—was entirely circumstantial. It is petitioner's contention that a fair and impartial scrutiny of all the testimony necessitates the conclusion that the testimony did not exclude the hypothesis of innocence. It left open the hypothesis that petitioner presented some document

other than a 'passport' as identification. Consequently proof of guilt beyond a reasonable doubt was lacking.

The law on the subject is clear and uniformly adopted. Some recent applications may be found in *Nosowitz v. United States*, 282 Fed. 575; *Romano v. United States*, 9 F. 2nd 522; *United States v. McNaugh*, 42 F. 2nd 835; *Stone v. United States*, 47 F. 2nd 202; *United States v. Park Ave. Pharmacy*, 56 F. 2nd 753; *United States v. Ruffino*, 67 F. 2nd 440; *United States v. Buchalter*, 88 F. 2nd 625; *United States v. Silva*, 109 F. 2nd 531. See also *Rivera v. United States*, 57 F. 2nd 816, *Neal v. United States*, 102 Fed. 2nd 643 and *Boatright v. United States*, 105 F. 2nd 737.

The Government's contention, as accepted by the Circuit Court of Appeals (R. 258) was "that the entry of the passport number on the manifest enabled him (Faire) to say with assurance that he had been shown the passport." The contention is unfounded because the presence of the passport number on the manifest at the time the witness examined the passenger justified only the inference that a passport would be asked for, not the further inference necessary for conviction that the passport had been presented. It is important to bear in mind that the witness, Faire, made a careful distinction between what he knew because of his "invariable" practice and what might have happened merely because of general (i.e. variable) practice. It was his "invariable practice" to ask for the presentation of a passport whenever, as here, there was a passport number on the manifest (R. 46). Had the crucial issue in this case been the question whether or not a passport had been asked for no complaint could have been made of its submission to the jury. But in this case that was not the issue. The fact for the jury to find was whether or not a passport had been presented, not whether it had been

asked for. On the subject of the presentation of the passport Faire's testimony clearly shows no invariable practice. He states at one place that it was "customary" for American citizens to present their passport (R. 49), but he expressly said on cross-examination that it was not necessary for them to do so and that they might identify themselves by other means such as birth certificates (R. 48), and on further questioning by the Court he stated that the checkmark against the name on the manifest indicated that the passenger had been admitted as a citizen but "not necessarily" that he had been admitted on a passport (R. 50). There is, therefore, no room for the drawing of any inference that in the particular case, of which the witness had no recollection whatever (R. 46), a passport had in fact been presented.

The first inference, namely that a passport had been asked for, was justifiable. That petitioner was admitted as a citizen is clear. But to infer that petitioner was admitted on a passport is inadmissible, is building inference upon inference.

Thus, from the point of view most favorable to the prosecution, the jury was asked to base an inference upon an inference (See R. 180), to infer from the fact that a passport was always asked for that in this particular case it had been shown, although no direct evidence that it was shown was presented and the evidence was clear that petitioner might have been admitted without a passport. Such building of inference upon inference has been consistently condemned in both civil and criminal cases. See *United States v. Ross*, 92 U. S. 281; *Manning v. John Hancock Insurance Company*, 100 U. S. 693; *Chicago, etc. Railroad Company v. Coogan*, 271 U. S. 472; *Smith v. Pennsylvania Railroad Company*, 239 Fed. 103.

But, in any event, the evidence is consistent with the hypothesis of innocence. The testimony in this case rests entirely on the manifest of the steamship Normandie (Government's Exhibit 6, R. 211). That showed a "List of United States citizens". It contained 30 names opposite each of which was a "passport number" and other data concerning place of birth, naturalization and residence. There were checkmarks against the names of all the persons on that list, but no checkmarks against any of the numbers. The list was apparently prepared by the purser (R. 42, 49). The witness, Faire, who was the only witness for the Government with regard to the alleged presentation of the passport, had nothing to do with the preparation of the list (R. 49). He merely signed it at the bottom (R. 45) and made the checkmarks against the names (R. 51). The testimony of Faire clearly shows that the manifest would be in the same form whether a passport was presented or whether some other means of identification was used (R. 48, 50). Thus the manifest was susceptible of an interpretation favorable to petitioner. And since Faire had no recollection of the occurrence (R. 46) there is a possibility that no passport was presented.

After stating that he had examined a great number of persons on incoming passenger ships, Mr. Faire said that he had no independent recollection of the arrival of defendant (R. 46). He said:

"Q. Do you have any independent recollection of the arrival of this particular individual, Robert Wiener? A. No, I don't."

He was then asked the following questions:

"Q. Can you state from looking at the manifest, Mr. Faire, whether or not the passport of the indi-

vidual Robert Wiener was presented to you? A. Yes, sir, I can.

"Q. On what do you base your statement? A. The number of the passport, No. 332207, is entered on the manifest and it is my invariable practice when the number of the passport appears on the manifest to ask for that passport and have it shown to me" (R. 46).

The last part of this answer was not intended by the witness to describe an "invariable" practice of the actual presentation of passports. His own invariable practice, based on the number on the list, was that he always asked for a passport, but as the rest of the record shows his invariable practice went no further than that. For, on further examination, he testified that it was not the invariable practice of passengers to present passports, that other means of identification might be presented, and that there would be no notation on the manifest to indicate that such other identification had been presented (R. 49).

On cross-examination Mr. Faire said that an American citizen did not need a passport in order to enter, that he could use anything which would satisfy the inspector as to his identity as an American citizen (R. 48). He might present a birth certificate, if the passport had been lost (R. 48, cf. 91). Then Mr. Faire said:

"Q. Any proof that would satisfy you of his American birth would pass him into the country as an American citizen? A. That is right.

"Q. It wouldn't have to be a passport? A. No.

"Q. Did you make any writing on the list of names as to what the people showed you yourself? A. No, I did not" (R. 49).

On re-direct examination the witness gave an affirmative answer to the direct question whether or not defendant had presented his passport in the particular case (R. 49), but on further cross-examination he explained that he based this answer only on the fact that there was a passport number on the manifest (R. 50).

And since the number on the manifest was not marked by a check its mere presence there proved no more than that a passport would have been asked for. In view of the witness' testimony that no notation of the presentation of other means of identification would have been made on the manifest (R. 49) the manifest itself throws no light whatever on the crucial issue in this case, the presentation of the passport. Whether a passport had been presented or other identification had been presented, the manifest would have appeared in the identical form in which it is now in the record (R. 211).

Finally, in close questioning by the Court the witness made it clear beyond any doubt that the admission of petitioner as a citizen was "not necessarily" based upon his presentation of a passport:

"The Court: * * * Do you mark on that manifest when a man identifies himself,—do you make any entry on the manifest when a man identifies himself as an American citizen?

"The Witness: The whole manifest is of American citizens.

"The Court: And when the man presented his passport what did you do?

"The Witness: That check mark shows he was admitted as a United States citizen.

"The Court: On a passport?

"The Witness: Not necessarily.

"The Court: Can you tell us whether he had a passport?"

"The Witness: From the fact the number of the passport appears there.

"Q. And you checked——

"Mr. Fowler: That is objected to.

"Q. Did you check the information on the manifest with information in the passport? A. That is correct" (R. 50).

This last statement is, however, pure supposition on the part of the witness, since he remembered nothing of the incident.

The substance of the testimony, therefore, is that the witness, having no recollection of the incident, supposes that a passport was shown in the particular instance only because there was a number on the list and he had made a checkmark against the name. But the first fact permits the inference only that a passport had been asked for and the second only that the passenger was admitted as a citizen. The inference that he was admitted on a passport is negatived by the rest of the testimony since the witness admitted that means of identification other than a passport might have been produced, that in such a case there would also be a checkmark against the name without any specific notation of the nature of the other means of identification. Finally, when pressed by the Court, the witness said that the checkmark indicated only that the person was admitted as a United States citizen and not necessarily that he was admitted on a passport.

In considering this point the Circuit Court stressed the witnesses' repeated statements "that the entry of the passport number on the manifest enabled him to say with as-

surance that he had been shown the passport" (R. 258): The difficulty with the Court's paraphrase of the testimony is that it leaves out decisive portions of it. It is our contention that the testimony must be considered as a whole and that so considered it lacks the proof essential in a criminal case. This becomes evident when the entire manifest in evidence is examined (R. 211). The page there shown consists entirely of American citizens (R. 50). In each instance there was a passport number; in each instance a checkmark, not against the number, but only against the name. The witness Faire had not put any number on the list (R. 49), but only the checkmark against the name (R. 51). The purpose of that checkmark was to show that the person named was admitted as an American citizen (R. 50). Citizenship is determined by the document presented as identification—and the witness testified that it did not have to be a passport (R. 48-49).

Moreover, the witness was unwilling to testify, in answer to the Court's question, that the presence of the checkmark meant that the person whose name had been checked had been admitted on a passport: the answer was "not necessarily" (R. 50). It is apparent, therefore, that Faire was not prepared to state that every person on that manifest had in fact shown a passport. Thus there was a possibility that one or more of the persons on the list had not shown a passport, despite the fact that each name was accompanied by a passport number. And since the witness had no recollection of petitioner (R. 46) it might have been petitioner who had shown something other than a passport with which to identify himself. And no testimony about "invariable practice" can overcome that "not necessarily."

The case is similar to *People v. Weiseman*, 280 N. Y. 385. In that case the Court of Appeals of the State of New York by Chief Judge Crane reversed a conviction and dismissed the indictment because no proper inference of guilt could be drawn. The charge there was escaping from custody while a prisoner. The evidence of the People indicated that defendant might have slipped out while a policeman took out other prisoners. However, the People's testimony also established that each of the persons who went out with this policeman was specifically accounted for. The Court pointed out that the inference which might have been permissible from the first part of the testimony was contradicted by the second part of the testimony and that under such circumstances defendant's guilt had not been proved beyond a reasonable doubt. Chief Judge Crane said at page 389:

"The People's case is made up on the inference that Weiseman must have slipped out when Devine took out his nine prisoners. This might have been a fair inference if it were not for the fact that these same People's witnesses contradict it."

So in the case at bar any ambiguity in the first part of Faire's testimony is clarified by the second part of it. The testimony as a whole is lacking in proof of the presentation of the passport. No proper finding of guilt is, therefore, permissible.

POINT III

The Trial Court erred in submitting to the jury the issues of non-citizenship and residence abroad.

The question arose because of petitioner's contention that issues had been submitted to the jury without any evidence to sustain the government's contention other than admissions by petitioner. The government charged that petitioner had made four false statements (R. 3); that his name was Wiener; that he was an American citizen; that he was born in Atlantic City, New Jersey, on a specified date; that he had never resided outside the United States. At the trial petitioner moved separately to exclude from the jury's consideration each of these four statements (R. 174-179, 180). Exceptions were noted to the Court's refusal (R. 174-181) and error duly assigned (Ass. 12-16, R. 249, 250). Since the Trial Court twice charged the jury that it could convict if it found any one of the statements false (R. 189, 194) there can be no doubt that error was committed if the jury was improperly permitted to consider any one of these four statements.

In support of that proposition of law petitioner, in the Circuit Court, relied on *Nash v. United States*, 229 U. S. 373; *Stromberg v. California*, 283 U. S. 359; *Patterson v. United States*, 222 Fed. 599; *Loomis v. United States*, 61 F. 2nd 653. The government did not then take issue with this contention and the Circuit Court assumed the rule to be applicable.

The point was properly raised at the trial.

However, in opposition to the application for certiorari herein, the Government contended that the question of the

insufficiency of the evidence had not properly been raised at the trial. That contention is entirely without merit. The Government's argument was apparently based on the fact that trial counsel had not excepted to the Trial Court's charge (R. 189, 194), that the jury might find petitioner guilty if convinced that any one of the four statements in the passport application was false. However, it was unnecessary for petitioner to except to those portions of the charge because petitioner had previously moved to withhold from consideration by the jury each one of the four statements, and had excepted to the refusal so to rule. If the Trial Court was right in submitting all four statements to the jury then it was correct in instructing the jury that it might find petitioner guilty on the basis of any one of the statements. . It would have been impertinent under those conditions to have excepted to that charge. The error of the Trial Court was not in the charge, but in the denial of the motions to withdraw from consideration by the jury the two statements particularly relied upon now.

Moreover, the attention of the Trial Court was expressly called to the point relied upon by petitioner here. Petitioner was not content merely to move for a directed verdict, nor even to move that each of the four statements be withheld from the jury on general grounds. Petitioner specifically asked the Court to withhold from the consideration of the jury the second statement relied upon by the Government (the one dealing with citizenship) on the ground that the evidence in support of that statement was insufficient because it consisted only of admissions. Counsel made the motion to withhold on the express ground "that all the evidence introduced by the government is in the nature of admissions * * *. The important thing is the

failure to introduce independent corroborative proof" (R. 175) and the Court's attention was called to the *Duncan* case, 68 F. 2d 136. It is clear, therefore, that as to this alleged ground of the prosecution's case the attention of the Trial Court was specifically called to the point raised by the petitioner in the Circuit Court of Appeals and now urged upon this Court. (See also R. 176.)

Likewise, with regard to the fourth statement, (the one dealing with residence abroad), a similar motion was made on the express ground that there was a failure of corpus proof "and admissions standing on their own here are not sufficient to let the matter go to the jury" (R. 179).

Petitioner preserved all his rights by excepting to the denial of both these motions (R. 175, 179).

That the Circuit Court of Appeals considered the issue properly raised is evident from the failure of that Court in its opinion to question petitioner's right to raise the same. This is all the more significant because that same Court had in recent cases such as *United States v. Dilliard*, 101 F. 2d 829; *United States v. Rebhuhn*, 109 F. 2d 512; *United States v. Mascuch*, 111 F. 2d 602, and *United States v. Smith*, 112 F. 2d 83, rejected similar arguments because counsel had not in those cases adequately presented the issue at the trial. The essential difference between that group of cases and the case at bar is that in those cases there were merely motions to dismiss separate counts, whereas in the case at bar there were specific and separate motions to withhold from the consideration of the jury each one of the four alleged false statements, all of which combined constituted but one count.

It is therefore evident that petitioner properly called the Trial Court's attention to the point now being raised

and that if any one of the four alleged false statements was improperly submitted to the jury the judgment of conviction cannot stand.

The applicable rule of law.

We come, therefore, to the basic problem. Was there sufficient evidence to go to the jury as to each one of the four statements alleged to have been false? Petitioner contends that as to two of them there was not, since the only evidence consisted of his own declarations. The government to prove non-citizenship relied solely on statements made by defendant reproduced in the manifest of S. S. Haverford of 1914 (Ex. 19, p. 229), in the registration record of 1918 (Ex. 21, p. 232) and in the reentry application of 1932 (Ex. 13, p. 220)—statements which indicated birth in Russia. Thus the government sought to establish that the 1936 passport statement of American birth was false not by proof that petitioner was born elsewhere, not even by a declaration of petitioner's that his 1936 statement was false, but merely by showing that petitioner had previously made different statements. Petitioner is shown to have made two inconsistent statements, but there is no proof as to which is false.

So, in attempted proof of residence abroad the government relied only on the same Haverford manifest (Ex. 19, R. 229). The brief absence in 1932, from April 19th to June 5th (R. 213, 212) can not be considered a "residence" (*Transatlantica Italiana v. Elting*, 74 F. 2nd 732; *In re Carnera*, 6 F. Supp. 267).

We shall deal hereafter with the claim of the government that there was independent corroboration of these admissions, a claim the Circuit Court appears to have

accepted (R. 258, 259), in so doing again conflicting with other courts. But since the main reliance of the Circuit Court was on the rule of law devised by it in conflict with other circuits we believe a square issue has been presented for disposition by this Court.

In the Circuit Court petitioner had contended that the general rule precluding conviction on admissions alone applied to this case. The government did not challenge the rule thus contended for, claiming only that there had been corroboration. This claim rested in part on the matters adverted to by the Circuit Court, to be discussed hereafter, in part on the contention that proof of the presentation of the passport was corroboration of one element of the crime and thus sufficient—a contention negatived by *Forte v. United States*, 94 Fed. 2nd 236. This latter contention on the part of the government was not mentioned by the Circuit Court in its opinion.

Instead the Circuit Court laid down a new rule of law, namely, that a conviction could rest on the unsupported declaration of a defendant made before the commission of the crime. In justification of that doctrine the Circuit Court argued that the rule contended for by petitioner had arisen as protection against an untrue confession, "coerced or psychopathic". Therefore, said the Court, the policy of the rule did not apply to declarations made before the commission of the offense.

The distinction thus made is an interesting one. There is no doubt that a higher probative value should be given to declarations made without the motive to falsify which exists when a person is charged with crime, and, to some extent, the law has taken cognizance of relative motivations. Various exceptions to the hearsay rule, such as the law of

dying declarations, evidently rest on such psychological considerations. But in the field of criminal law the requirement of independent proof of the *corpus delicti* goes beyond the narrow grounds of confessions obtained by coercion because of the accused's psychopathic disposition. It is intertwined with the presumption of innocence (*Clayton v. United States*, 284 F. 537). It rests on the evident fact that people often tell untruths and that convictions resting upon uncorroborated statements more often are unjust than otherwise.

The general rule barring convictions on uncorroborated confessions or admissions is of ancient origin and uniform application. Until the case at bar it appears never to have been challenged by judicial authority. It is true that Professor Wigmore casts doubt upon its wisdom, as a matter of policy (Wigmore on Evidence, Third Edition 1940, Sec. 2070, 2071). But he expressly admits that in the United States the courts have uniformly adopted the rule that corroboration was necessary, moved apparently by Greenleaf, who said (Greenleaf on Evidence, Sec. 217):

"This opinion certainly best accords with the humanity of the criminal code."

Moreover, Professor Wigmore cites as jurisdictions in which the corroborating evidence must concern the *corpus delicti* the following:

The United States, Alabama, Arkansas, California, District of Columbia, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Michigan, Minnesota, Missouri, Mississippi, Montana, Nebraska, Nevada, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Puerto Rico, South Carolina, Texas, Utah, Virginia, Washington, and West Virginia.

The rule is similarly cited as a general one by Chamberlayne, *The Modern Law of Evidence*, (1911), Sec. 1598, where he recognizes that the rule is one, not of evidence, but of substantive law "based upon what is assumed to be in the interest of public policy." And Underhill on Criminal Evidence (4th Edition, 1935), says on page 42:

"A voluntary confession or admission of the accused is not sufficient to prove the *corpus delicti* unless there is other evidence tending to support the same, either direct or circumstantial; or, in other words, a confession or admission by the accused to prove the *corpus delicti* must be 'corroborated'."

In considering the purpose of the rule, it must be borne in mind that this rule is applied in addition to the strict rule with regard to the admissibility of confessions and that it is universally adhered to, even though the circumstances attending the making of the confession indicate that it is genuine—those circumstances merely affect the admissibility, not the sufficiency, of the confession. Even corroboration of essential elements found in a confession does not affect this rule. As Underhill says at page 43: "Corroboration of a confession does not necessarily prove the *corpus delicti*," citing *People v. Besold*, 154 Calif. 363; *Allen v. State*, 4 Ga. Ap. 458.

It is thus evident that neither the rule dealing with the admissibility of confessions nor the rule affecting their sufficiency depends upon the fact that in a particular case the statements contained in the confession may have inherent plausibility or even may have been independently corroborated. Such corroboration merely permits these facts to come before the jury. (See Chamberlayne, Sec. 1614).

The proposition contended for here, that the rule applies as well to admissions as to confessions is sustained by ample authority. This is expressly stated by Underhill not only in the passage already quoted, but also on page 506, where he says:

"Admissions alone will not support conviction, as *prima facie* proof of the *corpus delicti* is necessary before they may be considered, and such admissions must be corroborated and considered with all the other circumstances."

It is true that Professor Wigmore intimates the contrary to be the case, but not by any express statement to that effect or by the citation of any authority whatsoever, saying only:

"Whether the accused's statement amounts to a confession so as to require corroboration under the present rule depends on the definition of a confession" (Sec. 2074).

This question was expressly passed upon by the Circuit Court for the Eighth Circuit in a case decided just after the decision in the case at bar, *Gulotta v. U. S.* 113 F. 2d 683. In that case defendant was convicted for having falsely represented himself as a citizen of the United States, qualified to vote, when in fact he had been born in Italy and had not been naturalized. To prove the falsity of the claim of American birth the Government introduced in evidence a statement made subsequent to the alleged crime, in which defendant declared that he had been born in Italy. The Government also introduced in evidence a statement made twenty years before the alleged crime, in which defendant declared his intention to become an American citizen and

then declared that he was an Italian citizen, and a passport purporting to have been issued in Italy thirty-five years before the date of the alleged crime, which stated defendant's birth to have been in Italy. The passport, although received as an admission, was rejected as independent evidence of foreign citizenship because it was not authenticated. The evidence as a whole was held insufficient because it consisted only of admissions made by defendant. The Court expressly rejected the Government's contention that in this respect there was any distinction between confessions and admissions. The Court did not expressly discuss the distinction made in the case at bar between declarations preceding the commission of the crime and those succeeding it. However, in that case two of the three statements relied upon by the Government had been made long before the commission of the alleged crime. Many cases were cited by Judge Thomas in support of the contention that the rule applies as well to admissions as to confessions. Two of these cases are of particular pertinence here because the only declarations there relied upon by the Government were declarations made before the commission of the crime.

In *Duncan v. United States*, 68 F. 2d 136 (9th Cir.), defendant was convicted on three counts: for false statements in obtaining a passport, which included a statement of birth at a particular time and place; for falsely representing himself as a United States citizen; for perjury in making the statements in the application for the passport. The Circuit Court upheld the conviction on the first and third counts because there was independent evidence that defendant had not been born at the time and place indicated—evidence stronger indeed than similar evidence in the case at bar because it was shown in the *Duncan* case

that defendant was in fact born elsewhere. But the Court reversed the conviction on the second count because there was no independent evidence of foreign citizenship. There, as here, the government relied on declarations made by the defendant before the commission of the crime—on the manifest of the original entry, and on applications for life insurance, for a marriage license and for naturalization.

In *Gordnier v. United States*, 261 Fed. 910, the same Court reversed a conviction for failure to register under the draft. The only proof that defendant was of the required age consisted of declarations concerning his age which defendant had made on earlier occasions. Such declarations, being but expressions by defendant of his own belief, the Court held could not form the basis of conviction of crime. Before sending a man to jail the government should establish that the earlier statement attributed to defendant really represented the facts.

In a number of state cases, statements made before the commission of the crime have been held insufficient in the absence of corroboration of the *corpus delicti*: *People v. Lambert*, 5 Mich. 349 (bigamy); *People v. Isham*, 109 Mich. 72 (adultery); *Hiler v. People*, 156 Ill. 511 (bigamy); *Green v. State*, 21 Fla. 403 (bigamy) see also *People v. Simonsen*, 107 Cal. 345 (false pretenses).

There is particular justification for the application of this rule to a case, like the present, where the charge is the making of two inconsistent statements. Without some proof that one of these statements is true and the other false, conviction should not follow. This has been recognized in prosecutions for perjury.

The analogy from the law of perjury is peculiarly apt in this case as the essence of that crime is false swearing,

which is in effect the charge made against the defendant here. A study of the perjury cases discloses that it is insufficient to convict an accused of perjury merely by showing that he made two or more contradictory statements.

The general rule in the United States in perjury cases is stated by Wharton, as follows:

"When the defendant has made two distinct statements under oath, one directly the reverse of the other, it is not enough to produce the one in evidence to prove the other to be false." (Wharton's Criminal Law (12th Ed.) Vol. 2, Sec. 1583.)

In all the perjury cases applying this rule, not one makes the distinction made by the Circuit Court in the instant case, between contradictory statements or admissions made before the event and those made after the event. On the contrary, there have been many reversals of conviction made upon contradictory statements or admissions alone, although they were made prior to the alleged criminal act.

Thus, in *People v. McClintic*, 193 Mich. 589, where the defendant testified twice under oath, contradicting himself the second time, the Court reversed a conviction of perjury based on the later testimony, saying (at p. 601):

"We think that it should be held that a conviction for perjury cannot be sustained merely upon contradictory sworn statements of the defendant, but the prosecution must prove which of the two statements is false, and must show that statement to be false by other evidence than the contradictory statement."

In *State v. Carter*, 315 Mo. 215, a conviction of perjury was likewise reversed, where the sole proof of falsity was

demonstrated by prior inconsistent statements of the accused. The Court said at page 217:

“* * * It was not sufficient to prove only that appellant made statements concerning such acts and admissions contradictory to his testimony when sworn and examined as a witness in respect thereto.”

In *Clayton v. United States, supra*, the defendant made certain statements to the police and thereafter contradicted those statements when testifying before the Grand Jury. The Court reversed the conviction, saying (at p. 539):

“In prosecutions for perjury it has long been settled that not only must the guilt of the accused be established beyond reasonable doubt, as in other criminal cases, but that the falsity of the matter sworn to by him must be proved by direct and positive evidence.”

In *Paytes v. State*, 137 Tenn. 129, the defendant was convicted of perjury for testifying at a trial contrary to his prior testimony before the Grand Jury. The conviction was reversed, the Court stating the rule as follows (at p. 131):

“But by a decided weight of authority the courts of this country declare the rule that in order to sustain a conviction for perjury it is not sufficient to prove merely that the accused at different times made, or testified to, two statements that cannot be reconciled; and that there must be some additional testimony as to the falsity of the matter in respect of which perjury is averred.”

Other cases in accord are:

Phair v. United States, 60 Fed. 2nd 953;

People v. Chadwick, 4 Cal. App. 63;

Richardson v. State, 45 Ohio, App. 46;

Billingsley v. State, 49 Texas Cr. 620.

This Court has just recognized the validity of that general rule:

United States v. Harris, decided Dec. 9, 1940.

It is obvious, therefore, that the Circuit Court, in the instant case, erred when, although accepting the general rule requiring the corroboration of extrajudicial admissions, it limited the scope of the rule to admissions made after the alleged crime. No other court in the United States has ever made that distinction.

The weakness of that distinction may be further shown if we assume, for the moment, that the defendant had made the alleged false statements concerning his citizenship and residence while testifying in court instead of in a passport application. Under the rule laid down unanimously by the cases above cited, he could not be convicted of perjury merely by proving that he had made prior inconsistent statements. Independent evidence of the falsity or *corpus delicti* of the later statements would be necessary.

Yet, in the instant case, the Court departed from the universally recognized rule and held that independent proof was unnecessary. Surely, this departure cannot be justified because the defendant was not charged with perjury in a court of law. The essence of the defendant's alleged crime and the essence of the crime of perjury is false swearing, and the rule governing one is equally applicable to the other.

To sustain the conviction of the defendant on contradictory statements made by him, without requiring independent evidence of the *corpus delicti*, is to depart from our long established traditions of Anglo-American law, which require, in every case, that there be proof that a crime was actually committed, outside of the extrajudicial statements of the defendant alone.

To the argument of policy which may be advanced by the government the answer of this Court should be that such questions of policy are for the Congress, not for the Court.

See Holmes, J. in *Beutler v. Grand Trunk Rwy.*, 224 U. S. 85, 88, 89.

After all, it is to be supposed that a diligent prosecutor will be able to obtain corroboration of the facts disclosed by admissions. That in an exceptional case this may prove impossible is no reason for rejecting a rule so well established and so universally applied. The decision in the case at bar is not only in conflict with all previous authority, but is indeed the first expression of a distinction never before even suggested. We believe it to be unsound and that it should be rejected by this Court.

The alleged corroboration.

As we have already pointed out, petitioner contends that certain issues had been improperly submitted to the jury because the evidence consisted only of admissions. The Circuit Court overruled this contention in part by holding that there had been corroboration (R. 258). In so doing it stated that it preferred the rule it had laid down many

years ago in *Daeche v. United States*, 250 F. 566, to the rule recently laid down by the Court of Appeals for the District of Columbia in *Forte v. United States*, *supra*. In that case the Court pointed out that the corroboration had to be of every essential element of the crime other than the identity of the wrongdoer. In the case at bar evidence was accepted as corroborative which merely "fortified" the truth of the admissions. The difference between the two rules is fundamental.

Moreover, there is conflict between the decision in the case at bar and that in the *Duncan* case *supra*. For in both cases the evidence was of similar character. In both the manifest at the time of first entry indicated foreign birth and nationality; in both defendant presented a certificate of native birth and the evidence permitted the inference that the record behind the certificate had been forged; in both defendant had repeatedly declared that he was an alien. These items were declared corroboration in the case at bar; they were rejected as corroboration in the *Duncan* case. To be sure there was in the case at bar some very vague proof that petitioner had not applied for naturalization (R. 71, 72). On the other hand in the *Duncan* case, defendant was proved to have been a party to the forgery of the native birth record and in that case there actually was proof of foreign birth; in the case at bar there was no proof of this kind whatever.

The difficulty with the argument of the Circuit Court in the case at bar arises from a failure separately to consider the various elements of the crime charged against him. Thus in discussing corroboration the Court linked together the declarations "of name, alienage, foreign birth and residence abroad." Of course, there was corrobora-

tion of petitioner's use of two names and he has never contended otherwise. And petitioner did not, in the Circuit Court, complain of the submission to the jury of the issue of his place of birth. But on the two relevant issues, alienage and residence abroad, we submit there was no corroboration.

The Circuit Court referred in the general discussion to three items of proof: the 1914 manifest; the forged Atlantic City record; the testimony about naturalization. The second and third of these could have no possible bearing on the issue of residence abroad and the first is not independent corroboration at all, since the manifest was, for all that appears, based only on the declarations of petitioner. Indeed counsel for the government so conceded at the trial (R. 177). Evidence of this kind was expressly held not corroboration in the *Duncan* case, and properly so. Thus it appears that there was no corroboration whatever of petitioner's declarations with respect to at least one of the issues submitted to the jury.

And with respect to the other, the question of alienage, the supposed corroboration is wholly insufficient. The manifest, we submit, may not be considered, being but an admission at second hand. The fact that the Atlantic City record was questioned is, under the *Duncan* case, insufficient, and on good logic. It but excludes one possible native birth and in no way even indicates foreign birth, much less foreign citizenship. Nor does the vague proof that petitioner had not applied for naturalization corroborate his declarations of foreign birth, since a failure to apply for naturalization is consistent, rather than inconsistent with the later claim of native birth. While, in the *Duncan* case, this proof was lacking, and its absence commented on, in

that case there was proof of foreign birth; therefore proof that there had been no naturalization might establish non-citizenship. But here the evidence outside the declarations adds nothing; it does not even "fortify."

Consequently there was insufficient evidence to justify submission to the jury of the issues of non-citizenship and residence abroad and, at the very least, a new trial must be had.

Conclusion

It is respectfully submitted that the judgment should be reversed and the indictment dismissed on the ground that the use alleged to have been made of the passport was not a violation of the law and any construction of the law which made such a use a violation of it would render other cognate provisions of the same law unconstitutional; and also on the ground that the government failed to prove a presentation of the passport as charged. At the least, appellant is entitled to a new trial because the Court erred in submitting to the jury two of the four alleged misstatements and in permitting the jury to find appellant guilty on the basis of any one of them when the evidence in support of these two was insufficient.

Respectfully submitted,

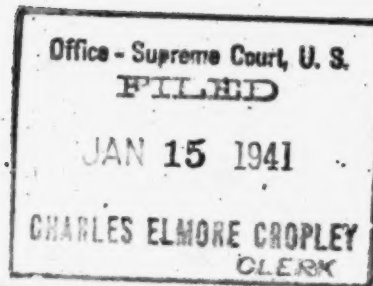
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Supreme Court of the United States

OCTOBER TERM 1940

No. 338

WELWEL WARSZOWER,
alias "Robert William Wiener", etc.,
Petitioner,

against

THE UNITED STATES OF AMERICA.

PETITIONER'S REPLY BRIEF

OSMOND K. FRAENKEL,
EDWARD I. ARONOW,
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No. 338

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PETITIONER'S REPLY BRIEF.

We shall deal briefly with the most important misconceptions of our position by the government and with various legal points which we believe have been incorrectly stated by the Government.

1. The interpretation of the statute.

The chief argument of the government is that Congress must have intended to punish presentation of a passport to an immigration inspector because otherwise an alien would be "immune" who employed a fraudulent American passport to obtain entry (see Browder brief p. 9, Warszower brief pp. 12, 13). But there was no need for Congress to legislate on that subject, since long before the enactment of the Espionage Act it had been criminal falsely to claim American citizenship (Act of March 4, 1909, U. S. C. A. Title 18 § 141).^{*} And it was under that earlier provision

^{*}Derived from Act of July 14, 1870, Ch. 254, 16 Stat. 254.

of law that the prosecution was conducted in the *Duncan* case. That the government has proceeded here under the wrong provision of law is no reason for giving an improper meaning to that provision.

2. The evidence of presentation.

The government suggests (p. 15) that this Court should not consider this point because two courts have considered the evidence adequate. This rule is but a "conventional" one, and does not apply where "clear error" is shown or where constitutional issues are involved. See *United States v. Appalachian Electric Power Co.*, 85 Law Ed. Adv. 201, 206. Here the error is clear and the total absence of evidence raises an issue of due process.

The government fails utterly to meet the issue. It seeks (pp. 16-18) to interpret Faire's testimony (R. 46) to mean that it was his invariable practice when a manifest contained passport numbers to have the passport shown to him. But if the answer originally given might be so interpreted—which we dispute, since all Faire could testify about was that he asked for passports—Faire's later testimony (R. 50) cannot be disregarded as is attempted by the government in its footnote to page 17. It is there suggested that Faire's "not necessarily" testimony referred, not to the particular list involved in this case, but to his general practice. The difficulty, however, with this argument is that Faire was precisely then talking about "that manifest" (R. 50) and it was the earlier testimony, relied upon by the government (R. 46), that was based on his practice. Moreover if all Faire's testimony was based on practice it cannot be one kind of practice for the government and another for the defense. The plain truth of the matter is

that Faire's testimony conclusively establishes that he could not be sure that petitioner had presented his passport.

For Faire testified that he had no recollection of the occasion and was able to testify only because he relied entirely on the passport number on the manifest, which number was on the manifest before it reached the witness, and that the entries on the manifest as produced in court were the same as they would have been had petitioner been admitted on some document other than a passport. And, when specifically asked by the court whether the checkmark against the name (the only mark made by the witness) indicated the admission of the passenger on a passport, his answer was "not necessarily". This is not evidence to the effect that petitioner presented a passport.

The Government's contention (p. 18) that Faire's "invariable practice" permitted him to be certain that he had seen the passport ignores the witness' testimony that persons were admitted without presenting passports, that the manifest did not show when that was the case and that the checkmark did "not necessarily" indicate that any particular person was admitted on a passport. Thus the testimony as a whole completely negates the possibility that there was any "invariable practice" to have a passport shown.

Apparently recognizing the absence of evidence on the subject the government is driven to the argument (p. 18) that the jury might have inferred that the passport was presented because, says the government; "it is clear that he had the passport in his possession when the manifest was made up." There is no such evidence in the record—the purser who apparently made up the manifest (R. 42, 49) was not a witness. Nor was the case tried on any such theory. For the Court charged, at the request of the de-

fense, that the jury might not base one inference upon another (R. 195).

3. The law as to admissions.

Before discussing the legal questions presented we wish to take issue with the statement in the government's brief (p. 19) that petitioner does not contest the "adequacy of the proof" that he falsely stated his name or place of birth. That is not correct. Petitioner is not here challenging the propriety of submitting those issues to the jury; he has never conceded the charges made.

The government in rejecting the application to this case of the general rule requiring corroboration of admissions relies largely on *U. S. v. Miles*, 103 U. S. 304, (cited p. 22) and *U. S. v. Wood*, 14 Pet. 430 (cited pp. 37, 40). Neither case is apposite.

In the *Miles* case the issue was a former marriage. The defense did not contend, as was contended here, that evidence of admissions was insufficient without corroboration, but that proof of a marriage was improper except by witnesses present at the ceremony. The brief statement of this Court approving a charge which permitted conviction upon the admissions of the defendant can, therefore, be given no significance. Whenever the issue has been clearly raised in bigamy cases, the ruling has been that admissions alone are not enough to establish the first marriage. (See cases cited p. 34 of the original brief).

The *Wood* case is also not authority for the rule that conviction may be had on the uncorroborated admissions of the defendant. No such question was raised in that case. There again the defense sought to rely, not on the general rule, but on a special rule in perjury cases requiring at

lease two witnesses. This Court merely decided that where the falsity of the statement charged to the defendant was proved by unimpeachable documents, it would be absurd to require oral testimony. In that case the question was the price which had been paid for certain merchandise. The government proved from the books of defendant that he had paid a higher price than stated in the questioned oath. The evidence was accepted not as an admission inconsistent with the sworn statement, but as proof of a fact contrary to what was there asserted. Such was the view of that case taken by Mr. Justice Butler in *Hammer v. U. S.*, 271 U. S. 620, 627 (cited on p. 40).

The government leans heavily on Prof. Wigmore. Of his valuable services in the field there can be no question, but he tends to ignore that humanity which even the criminal law preserves and shows a definite bias in favor of the prosecution; a bias not accepted by the courts. Thus this Court has maintained its salutary implementation of the Fourth Amendment from *Weeks v. United States*, 232 U. S. 383 (1914) to *Nardone v. United States*, 308 U. S. 338 (1939), despite Wigmore's persistent disapproval. (Wigmore, *Evidence*, 1st ed.—1905—§ 2264, pp. 3125-7; 2nd ed.—1923—Vol. IV, §§ 2183, 2184, pp. 626-39, § 2264, pp. 867-71; 3rd ed.—1940—Vol. VIII, §§ 2183, 2184, pp. 4-40, § 2264, pp. 366-72; *Using Evidence Obtained by Illegal Search and Seizure*—1922—8 A. B. A. J. 479).

And the government has sought (p. 24) to support Wigmore by appeal to the authority of Greenleaf. This attempt has miscarried. For the government has but brought forth the young Wigmore to uphold the old. The entire quotation from section 213 on pages 24 and 25 of the government's brief was written, not by Greenleaf, but by Wig-

more as editor of the 16th edition.* And the citation of Jones on Evidence (p. 25) throws no light whatever on the problem here involved, since that author does not discuss it. (The reference to § 295 is an error, perhaps § 893 was intended.)

Nor is the government accurate in suggesting (p. 24) that Chamberlayne is authority for the proposition that admissions have the same effect in criminal as in civil cases. For in § 1390 of his work that author recognizes the difference as contended by petitioner.

While it is true that the English courts have not adopted a definite rule as to corroboration it is not accurate to say (p. 27) that either they or the Massachusetts courts have explicitly rejected it. See *Com. v. Zelenski*, 287 Mass. 125.

The Government in its brief (pp. 11, 35-40) apparently misconceives our position in referring to the perjury cases. We have not contended for the application of any special rule as to the quantity of evidence. We are not concerned with the number of witnesses needed in perjury prosecutions, but with the rule, that conviction may not be based alone on prior inconsistent statements of the defendant, whether under oath or not. This rule was reaffirmed not only in the *Hammer* case cited by the Government (p. 40) but in the *Harri*s case recently decided by this Court (85 Law. Ed. Adv. 141). Its universality has never been questioned. While it is true that the rule has been changed by statute in a number of jurisdictions, such as New York and New Jersey (see government's brief, p. 39 footnote 7), there is no instance of its rejection by any American court

*The entire quoted matter is printed in brackets in that edition, proof that it was written by the editor—see p. VII—who was Wigmore. Cf. 15th ed. in which this is not found.

in the absence of statute. The various cases in the Federal Court cited on page 40 deal with entirely different subjects.*

The suggestion (p. 36) that, by analogy to bankruptcy cases, the rules with regard to perjury do not apply here, is without foundation. The cases cited have nothing to do with the subject of admissions, but only with the technical rule concerning two witnesses, a rule which both of the cases point out has been modified by the *Wood* case. Moreover, in holding that the perjury rule did not apply to false swearing in bankruptcy, the Court in both of these cases was influenced by the fact that Congress had enacted a special law dealing with false swearing in bankruptcy with a penalty considerably less than that provided for perjury. However, the punishment under the statute in the case at bar is identical with that provided for perjury, namely, \$2,000 maximum fine and five years maximum imprisonment. (See U. S. C. A. Title 18 § 231.)

4. The alleged corroboration.

a. There is no substance to the contention (p. 29) that the Haverford manifest constituted corroboration on the issue of citizenship. On the assumption made by the government (pp. 4, 29) that the information therein contained was based on statements made by petitioner,** this manifest constituted one of the admissions relied on by the government. But it cannot be given the additional feature now

*In the *Sullivan* case the conviction was reversed; in the *Gordon* case only the two witness rule was involved; in the *Jacobs* case the evidence against defendant was documentary, but did not consist of admissions—indeed that subject was not discussed in any of the cases.

**The record (R. 85, 86, 89) hardly confirms the assumption.

claimed by the government of constituting independent proof of the facts, especially since at the trial government counsel conceded that this manifest amounted to "nothing but his own declaration" (R. 177). An admission does not become independent proof merely because it is preserved in a public record—and the cases cited (p. 29) do not so hold. Moreover, the *Duncan* case is explicit authority against the government.

And the same case is authority for rejecting the false claim of a specified native birth as corroboration.

—We have already discussed (main brief, p. 40) the only other evidence relied on, the meagre and incomplete proof concerning the absence of an application for naturalization. We should like to add this. Had petitioner applied for naturalization that act would have been relied on by the government as corroboration of his admissions. Surely failure to apply for naturalization cannot also be such corroboration.

We are at a loss to understand the reference to the war in Europe (p. 31). Soviet Russia is not at war and there is no basis for the suggestion that it would have been impossible to obtain a duly authenticated record of petitioner's birth in Russia, if that was the fact. The "enormous" difficulty of proof for which the *Duncan* case was cited was not a difficulty of proof at all, but a carelessness in authentication. Moreover, as Judge Chase said in *United States v. Buchalter*, 88 F. 2nd 625 at 626:

"Difficulty of proof is no substitute for actuality of proof and an accused is presumed to be innocent and entitled to be acquitted until proved guilty as charged beyond a reasonable doubt."

Finally, the government (p. 32) misconceives the rule we rely upon. We have not asserted that the independent proof must establish the *corpus delicti*. We readily accept the formulation of the rule contained in the most recent of the cases cited by the government, *Gregg v. United States*, 113 F. 2d 687, that the corroborating evidence

"need not of itself sufficient proof of guilt but need only by a substantial showing which, together with the defendant's confession or admission, establishes the crime beyond a reasonable doubt."

Within that rule there have been many decisions reversing convictions. We believe that an examination of the cases will indicate that the case at bar falls within their category rather than within the category of the cases cited by the government (p. 32) in which the corroborating evidence was held adequate. In addition to the cases cited in our original brief (pp. 29, 32, 33, 34), we refer to: *United States v. Mayfield*, 59 Fed. 118; *Naftzger v. United States*, 200 Fed. 494; *Goff v. United States*, 257 Fed. 294; *Martin v. United States*, 264 Fed. 950; *Tingle v. United States*, 38 F. 2d 573.

b. The contention (p. 34) that if there was a presentation of the passport that constituted corroboration is utterly without support. The rule laid down in the *Forte* case is not harsh, nor, so far as appears, a minority view. There is nothing in the New York cases cited by the government (pp. 34, 35) which supports its contention. In both these cases there had been independent proof of the crime, homicide in the one instance, driving while intoxicated in the other. The additional elements involved, the felony and the previous offense affected only the degree of crime. In the

Warner case it appeared that defendant had admitted the prior conviction in open court, (see 244 App. Div. 833). But in the case at bar presentation of a passport was not a crime and did not become a crime until fraud in its procurement was shown. To say that proof of the presentation alone constituted proof of the *corpus* is to depart from all hitherto accepted concepts of the criminal law. Moreover, when the New York Court of Appeals has been confronted with an issue of corroboration of a vital element in the crime it has shown a scrupulous regard for the rights of the accused. See *People v. Oley*, *People v. Feolo*, *People v. Maione*, decided December 31, 1940, not yet reported.

Respectfully submitted,

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No. 838

In the Supreme Court of the United States

OCTOBER TERM, 1940

WILHELM WAREHOFFER, ALIAS "ROBERT WAREHOFF"
WILHELM, ET AL. DEFENDANTS

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF HABEAS CORPUS TO RELEASE
SAID DEFENDANTS FROM THE CUSTODY OF THE UNITED STATES
MARSHAL

JOHN WAREHOFF, ATTORNEY AT LAW

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 338

WELWEL WARSZOWER, ALIAS "ROBERT WILLIAM
WIENER," ETC., PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SECOND
CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals
(R. 296-300) is reported at 113 F. (2d) 100.

JURISDICTION

The judgment of the Circuit Court of Appeals
was entered July 24, 1940 (R. 300). The petition
for a writ of certiorari was filed August 14, 1940.
The jurisdiction of this Court is invoked under
Section 240 (a) of the Judicial Code, as amended
by the Act of February 13, 1925. See also

Rule XI of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the courts below properly construed U. S. C. Title 22, Section 220, punishing the "use" of a passport secured by a false statement, to include the exhibition of a passport, as proof of citizenship, to an immigrant inspector by the holder of the passport upon his return to this country.¹

2. Whether there was substantial evidence to prove a "use" of the passport.

3. (a) Whether the petitioner's conviction must fail if, as he contends, there was not sufficient competent evidence to establish the falsity of two of the four alleged false statements made in his passport application.

(b) Whether, if a review of the evidence as to these two alleged false statements is permissible, the Government sufficiently corroborated certain

¹ This point was disposed of by the Circuit Court of Appeals upon the basis of its prior decision in *Browder v. United States*, 113 F. (2d) 97 (R. 297-298), in which a petition for a writ of certiorari is now pending in this Court (No. 287). Since the petitioner relies upon the arguments advanced in that petition and the supporting brief, the Government also depends upon its discussion of the point in its brief in reply to the petition. In that brief the Government contended that the point was correctly decided by the Circuit Court of Appeals and that it did not require review by this Court.

declarations of the petitioner tending to establish their falsity which were made before the application for the passport.

STATUTE INVOLVED

The pertinent portion of U. S. C., Title 22, Section 220 (Section 2 of Title IX of the Act of June 15, 1917, c. 30, 40 Stat. 227), is as follows:

* * * whoever shall willfully and knowingly use or attempt to use * * * any passport the issue of which was secured in any way by reason of any false statement, shall be fined not more than \$2,000 or imprisoned not more than five years or both.

STATEMENT

An indictment in one count was returned in the District Court for the Southern District of New York which charged that the petitioner violated U. S. C. Title 22, Section 220, by using a United States passport which he had secured by making certain false statements in the application therefor. It was alleged that the petitioner used this passport by presenting it to an immigrant inspector at the Port of New York for the purpose of securing entry upon his return from a trip abroad. The statements in the passport application which were charged to have been false were (1) that his name was Robert William Wiener; (2) that he was a citizen of the United States; (3) that he was born at Atlantic City, New Jersey, on September 5,

1896; and (4) that he had not resided outside the United States. (R. 4-5.)

Petitioner was convicted (R. 226) and sentenced to two years' imprisonment (R. 235). On appeal to the Circuit Court of Appeals for the Second Circuit the conviction was unanimously affirmed (R. 300).

The evidence is sufficiently summarized in the opinion of the Circuit Court of Appeals (R. 296-297).

ARGUMENT

I

Petitioner contends that there was not sufficient evidence to establish that he "used" the passport upon his return to this country. The testimony of the immigrant inspector on this point is contained at R. 52-58. This testimony, we submit, clearly supports the conclusions of the Circuit Court of Appeals (R. 298) that the immigrant inspector "testified repeatedly that the entry of the passport number on the [ship's] manifest enabled him to say with assurance that he had been shown the passport and had checked the information on the manifest as to residence and place of birth against information in the passport," and that the immigrant inspector's "testimony, if believed by the jury, made it plain that the passport issued to the appellant had been exhibited to him." Upon appeal the question is not, of course, whether the Government proved its case beyond a reasonable

doubt but simply whether there was any substantial evidence to warrant its submission to the jury.

II

Petitioner concedes that two of the four alleged false statements which were charged in the indictment to have been made in his application for a passport were established by sufficient competent evidence (Br. 17). He contends, however, that as to the remaining two alleged false statements, i. e., (1) that he was a citizen of the United States and (2) that he had never resided abroad, their falsity was not sufficiently proved because the Government relied solely upon certain uncorroborated prior declarations of the petitioner and because, if there was corroboration, it was inadequate. He further contends that he is entitled to a review of the evidence as to these two alleged false statements since in the trial court he questioned the sufficiency of the evidence as to each of the four alleged false statements and moved to have them withdrawn from the jury's consideration.

With reference to the petitioner's contention that it was not permissible to establish the falsity of the statements in the passport application by the petitioner's uncorroborated prior declarations, the Circuit Court of Appeals, after stating that the rule is that an accused may not be convicted on his uncorroborated confession, held, we think correctly, that this rule related only to uncorroborated con-

fessions or admissions after the event (R. 298). It conceded, however, that the uncorroborated confession rule had been pressed so far as to extend to the declarations of the accused made before the occurrence of the alleged crime in *Gordnier v. United States*, 261 Fed. 910, and *Duncan v. United States*, 68 F. (2d) 136, both decisions of the Circuit Court of Appeals for the Ninth Circuit (R. 299). A similar holding was made in *Gulotta v. United States* (unreported), decided by the Circuit Court of Appeals for the Eighth Circuit on July 24, 1940.² We do not believe it necessary for this Court to resolve this conflict in the present case since, for the following reasons, the resolution of the conflict would not entitle the petitioner to a reversal of his conviction:

(a) The petitioner conceded in the Circuit Court of Appeals and again concedes in this Court that the Government properly established the falsity of two of the four alleged false statements which he made in his passport application. He did not take that position in the trial court. He there contended that none of the four alleged false statements were sufficiently proved and therefore that all of them should be withdrawn from the jury's consideration (R. 198-205, 207). In addition, he acquiesced in a charge of the trial court, twice

² No reference is made in that decision to the decision of the Circuit Court of Appeals in the instant case rendered two weeks earlier.

given, that the jury might find the petitioner guilty if convinced that any one of the four statements in the passport application was false (R. 217, 224). If the petitioner had then taken the position which he now does and were fearful that the jury might base its verdict upon a statement the falsity of which was not established, he could have requested that only those statements be submitted to the jury which had properly been proved to be false. If this had been done and the trial court had nevertheless submitted all of the four alleged false statements to the jury, the petitioner would then have been in a position to urge the insufficiency of the evidence as to those statements which he deemed not proved to have been false. The petitioner should not be permitted to put the trial court in error because he now feels that the jury's consideration should have been restricted to two of the alleged false statements. Cf. *United States v. Mascuch*, 111 F. (2d) 602 (C. C. A. 2d), pending on petition for writ of certiorari No. 116, present Term; *United States v. Smith*, 112 F. (2d) 83, 86 (C. C. A. 2d).

Moreover, the petitioner could only have been prejudiced on the theory that the jury might conceivably have based its verdict upon one of the alleged false statements as to which, according to the petitioner, there was insufficient proof, rather than upon those as to which he admits there was adequate proof. No such presumption can be in-

dulged, particularly in view of the charge of the trial judge that the falsity of any statement on which the jury might base its verdict must be established beyond a reasonable doubt (R. 217-218). The jury is, of course, presumed to follow the court's instructions. A reversal may only result where prejudice is clearly shown (*Berger v. United States*, 295 U. S. 78). In the instant case there is no clear showing of prejudice. Petitioner has admitted that adequate proof establishing the falsity of at least two of the statements in the passport application was adduced. It is settled that in analogous cases under the perjury statute several assignments of perjury may be set forth in a single count and that conviction will be sustained if any one of such assignments is proved. *United States v. Mascuch, supra*; *United States v. Otto*, 54 F. (2d) 277, 279-280 (C. C. A. 2d); *Claiborne v. United States*, 77 F. (2d) 682, 687, 691-692 (C. C. A. 8th); *Clayton v. United States*, 284 Fed. 537, 539 (C. C. A. 4th); Wharton's *Criminal Law* (12th ed.), Vol. II, Sec. 1567.

(b) If, as petitioner contends, corroboration was necessary to support the declarations of the petitioner establishing the falsity of the statements made by him in his subsequent application for a passport, he admits, as we have stated, that the falsity of two of these statements was sufficiently proved. As to the petitioner's other two statements, i. e., that he was a citizen of the United

States and that he never resided abroad, we submit that there was ample corroborative proof. The so-called declarations of the petitioner, summarized in the opinion below (R. 297)³ disclose that the petitioner had repeatedly stated prior to his application for a passport that he was a citizen or subject of Russia; that he was never in the United States before his arrival in 1914 and that his permanent residence before such arrival was in Russia. In addition to these declarations the Government introduced proof that the certified extract of the Atlantic City birth record (Exs. 10-11, R. 249-250; Exs. A, C, R. 273-275) which the petitioner had presented when applying for a passport in support of his claim of American citizenship, was based upon a forgery (R. 130-135), and that no certificate of birth of the petitioner had ever been filed in the State Bureau of Vital Statistics at Trenton, New Jersey, as required by law (R. 35-36). The Government also established that the petitioner had never applied for naturalization (R. 83). Clearly this evidence proved that the peti-

³ These were the manifest of the ship on which the petitioner first arrived in this country in 1914 (if it be assumed that this manifest could be considered as a declaration of petitioner) (R. 98, Ex. 19, R. 261); the petitioner's declaration of arrival here at that time (R. 97); the petitioner's draft records, consisting of his registration card and questionnaire (R. 106, 107; Ex. 21, R. 264); and petitioner's application for a reentry permit in 1932 (R. 84; Ex. 13, R. 252; see also R. 86-89; Exs. 14, 16, R. 253, 255).

tioner's claim of birth in this country was false, that he had not acquired citizenship by naturalization, and that, being an alien, he must have resided abroad. This evidence consequently fully corroborates the statements as to his foreign citizenship and residence abroad which petitioner made in his pre-passport declarations.

In *Duncan v. United States, supra*, there was not, as here, proof that the defendant had never applied for citizenship, a point upon which that case turned.

Forte v. United States, 94 F. (2d) 236 (App. D. C.), is also not in point. That case merely held that a conviction could not be based upon a confession without corroboration of the entire *corpus delicti*. Not only was no confession involved here, but even if the falsity of the statements in the application for the passport may be deemed a part of the *corpus delicti*, the petitioner's prior declarations establishing falsity were, as we have shown, fully corroborated. In addition, the use of the passport, the gist of the offense, was proved by direct evidence and not by declarations or admissions.

CONCLUSION

This case does not require the resolving of any alleged conflict of decisions and there is presented no important question of Federal law. We there-

fore respectfully submit that the petition for a writ of certiorari should be denied.

FRANCIS BIDDLE,
Solicitor General.

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SEPTEMBER 1940.

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 338

WELWEL WARSZOWER, ALIAS "ROBERT WILLIAM
WIENER," ETC., PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 256-260) is reported at 113 F. (2d) 100.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 24, 1940. (R. 260). The petition for a writ of certiorari was filed August 14 and was granted October 14, 1940. The jurisdiction of this Court is conferred under Section 240 (a) of the Judicial Code, as amended by the Act of February

13, 1925. See also, Rule XI of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the statute making criminal, willful and knowing "use" of "any passport the issue of which was secured in any way by reason of any false statement" (U. S. C., Title 22, Section 220) applies to the use of a United States passport as proof of United States citizenship and consequent right to enter the country by a resident alie returning from a trip abroad.

2. Whether this Court will consider the sufficiency of the evidence to prove that the passport was used to obtain entry and, if so, whether the evidence was sufficient.

3. Whether petitioner's own statements that he was an alien and that he had resided abroad, made under oath on three different occasions long before he obtained and used a United States passport, were sufficient without corroboration to prove that such was the case; and, if not, whether there was sufficient corroboration.

STATUTE INVOLVED

Section 2 of Title IX of the Espionage Act of June 15, 1917, c. 30, 40 Stat. 227 (United States Code, Title 22, Sec. 220) provides:

Whoever shall willfully and knowingly make any false statement in an application for passport with intent to induce or secure

the issuance of a passport under the authority of the United States, either for his own use or the use of another, contrary to the laws regulating the issuance of passports or the rules prescribed pursuant to such laws, or whoever shall willfully and knowingly use or attempt to use, or furnish to another for use, any passport the issue of which was secured in any way by reason of any false statement, shall be fined not more than \$2,000 or imprisoned not more than five years or both.

The full text of Title IX of the Espionage Act of June 15, 1917 (United States Code, Title 22, Secs. 213, 220, 221, 222) is set forth in the Appendix, *infra*, pp. 42-43.

STATEMENT

The petitioner was indicted in the District Court of the Southern District of New York on December 4, 1939 (R. 2). In a single count, the indictment charged the use of a United States passport secured by an application which contained false statements. The statements in petitioner's passport application which were alleged to be false were: (1) that his name was Robert William Weiner; (2) that he was a citizen of the United States; (3) that he was born at Atlantic City, New Jersey, on September 5, 1896; and (4) that he had not resided outside the United States (R. 3). The indictment alleged that the petitioner used the passport by presenting it to an immigrant inspector at the port of

New York to secure entry as an American citizen upon his return from a trip abroad. Petitioner was convicted on February 15, 1940 (R. 196) and sentenced to two years' imprisonment (R. 205). On appeal to the Circuit Court of Appeals for the Second Circuit, the judgment was unanimously affirmed (R. 260).

The evidence at the trial established the following facts: The petitioner arrived at the port of Philadelphia on March 27, 1914, aboard the *S. S. Haverford* (R. 86; Ex. 19, R. 229). In the manifest which had been prepared by the steamship company or the master of the ship (R. 89), the following information was included: the petitioner's name was Welwel Warszower; his age was twenty-one years; he was a citizen or subject of Russia; his last permanent residence had been in Vikolsk, Czernigow; his father was his nearest relative in the country from which the alien had come and his father's address was Vikolsk, Russia; his destination was Pittsburgh where he was going to join his brother-in-law; he had never been in the United States before; and he had been born in Radanjenko, Russia (Ex. 19, R. 229). The accuracy of these statements was checked with petitioner himself upon his arrival at Philadelphia (R. 85-86, 89).

Three years later, on June 5, 1917, the petitioner registered under the Selective Service Act (R. 93-96). On that date he signed a registration card,

using the name "William Weiner", and stating that he had been born in Russia on September 5, 1893, and that he was a citizen or subject of Russia (R. 94-96; Ex. 21, R. 232). Subsequently, on December 31, 1917, the petitioner returned the draft questionnaire which he signed "William Weiner" (R. 95; Ex. 21, R. 232). In it, he claimed exemption as an alien born in Russia on September 5, 1893. He said that he had arrived in this country at Philadelphia on March 28, 1914, aboard the *S. S. Haverford*, that his parents had not been naturalized, that he had not taken out his first papers, and that he was willing to return to Russia and to enter its military service (Ex. 21, R. 232).

In 1932 the petitioner desired to travel in Europe. He applied for a reentry permit, which is required only of aliens, on March 4, 1932, using the name Welwel Warszower (R. 73-75, 106; Ex. 13, R. 220). In making the application, he showed the inspection card which had been issued to him upon his arrival in 1914 at Philadelphia (R. 75; Ex. 14, R. 221). The answers by the petitioner to the questions contained in the application form coincided exactly with those contained in the manifest of the *S. S. Haverford* (R. 87; Exs. 13, 16, R. 220, 223). He gave Russia, September 5, 1893, as the place and date of his birth; Philadelphia, March 27, 1914, as the place and date of his arrival in the United States; Kiev, Russia, as his last permanent residence before his arrival here; and his

age at the time of his arrival as twenty-one years, six months (Ex. 13, R. 220). He stated his address to be "c/o William Weiner, 245 East 175th Street, Bronx, New York" (Ex. 13, R. 220). A reentry permit was issued to the petitioner in the name of "Welwel Warszower" on March 16, 1932 (R. 77; Ex. 12, R. 219). Notice that it had been issued was sent to him "c/o Wm. Weiner" (Ex. 17, R. 225). He then went abroad and used the permit when he reentered the United States on June 5, 1932, aboard the *S. S. Bremen* at New York (R. 78, 81, 82; Exs. 7, 12, 18, R. 212, 219, 228).

At no time had the petitioner made application for naturalization (R. 72-73). United States passports may only be issued to American citizens (R. 21; Exs. 1, 4, R. 206, 209). Nevertheless, when he desired to travel to Europe again in 1936, he applied for a United States passport, using the name "Robert William Wiener", Exs. 1, 22, R. 206, 233). In the application he claimed to be a citizen of the United States, born in Atlantic City, New Jersey, on September 5, 1896 (Ex. 1, R. 206). The form contained a space in which the applicant was to indicate any periods of residence outside the United States (Ex. 1, R. 206). Petitioner left the space blank when he presented the application to the agent of the State Department (R. 7). The agent then asked petitioner whether he had ever been abroad before, and petitioner replied that he had not (R. 7, 8). The agent then filled in the

word "none," and the application contained this denial when petitioner swore to its truth (R. 8).

In order to establish his citizenship and, consequently, his eligibility to receive a passport, the petitioner submitted a certified transcript from the birth records of the Registrar of Atlantic City, New Jersey, which stated that "Robert William Wiener" had been born there on September 5, 1896, the son of "Solomon Wiener". (R. 17; Ex. C, R. 243). The entry in the birth records (Ex. 9, 10, 11, R. 216, 217, 218) from which this transcript was copied was proved to be a forgery; the handwriting in which the entry was made was different from that of the surrounding entries, and the condition of the ink showed that it had been made much more recently than the others (R. 114-155, 157-163). Moreover, although the law of New Jersey required that all original birth certificates be filed in the Bureau of Vital Statistics in Trenton (R. 29-30, 59-61), no such certificate was found in the Trenton files under the names of "Robert William Weiner," "Robert William Wiener," "William Weiner," "William Wiener," or "Welwel Warszower," or under any similar surname beginning with "V" (R. 30-31).

On July 21, 1936, the Department of State issued passport Number 332207 to "Robert William Weiner" (R. 25; Exs. 2, 5, R. 207, 210). On September 30, 1937, petitioner arrived at the Port of New York aboard the *S. S. Normandie* (R. 52,

106; Ex. 6, 8, R. 211, 215). He exhibited the passport to the immigration inspector who boarded the ship and by this means satisfied the inspector that he was a citizen of the United States entitled to enter immediately (R. 44-51).

Petitioner moved for a directed verdict and a dismissal of the indictment at the end of the Government's case (R. 165-180). After the argument of the motion petitioner rested his case and renewed the motion which was again denied (R. 180-181). The jury returned a verdict of guilty (R. 196). Petitioner moved to set aside the verdict and in arrest of judgment and this motion was also denied (R. 197).

SUMMARY OF ARGUMENT

I

The use of a United States passport to obtain entry to the United States as an American citizen is a "use" which falls within the prohibition of the statute. The Government's arguments in support of this contention are set forth at length in the brief in *Browder v. United States*, No. 287, present Term. They apply with even greater force to the case of an alien who presents the passport to effect an illegal entry.

There is no basis for the petitioner's argument that the word "use" in U. S. C., Title 22, Section 220, cannot be considered applicable to the presentation of a United States passport to obtain entry to this country because a similar interpretation of

the word in cognate sections of the Act (U. S. C., Title 22, Secs. 221, 222) would make criminal the presentation of an expired passport by a citizen to obtain entry from Canada or Mexico and would thus render them unconstitutional. It is at least debatable that those sections are inapplicable to passports which are invalidated by the ordinary time limitation. Moreover, there is no support for the contention that Congress could not constitutionally prohibit the use of expired passports to obtain entry. Finally, it is not open to the petitioner to resist a fair interpretation of the provision punishing the use of fraudulently obtained passports which presents no constitutional doubt by invoking a constitutional doubt as to other provisions if the word "use" is similarly interpreted there.

II

It is doubtful whether this Court will review the sufficiency of the evidence that petitioner presented the passport to the immigrant inspector at the Port of New York, since two courts have sustained its sufficiency. In any event, the testimony of Inspector Faire to that effect is clear, and petitioner's contention that it is equivocal rests upon a misunderstanding of the witness' description of his invariable practice with respect to the examination of persons entering the country. And even if the evidence showed no more than petitioner concedes it does, the jury would have been justified in inferring that the passport was actually exhibited.

III

Petitioner contends that there was insufficient evidence to prove the falsity of two of the four, allegedly false statements made in his application for a passport, namely, that he was a citizen and that he had never resided abroad. His admissions at the time of entering the country in 1914, in his draft record of 1917, and in his application for a re-entry permit in 1932, are adequate, standing alone; and, in any event, were sufficiently corroborated.

The corroboration rule in confession cases is inapplicable to admissions, such as these, which are repeatedly made long before the commission of the allegedly criminal act and under circumstances that exclude the hypothesis of improper influence. The distinction between confessions and admissions for purposes of the rule requiring corroboration has been recognized by this Court and by several commentators. Indeed, even as applied to confessions, the blanket requirement of independent proof has been widely attacked and rejected.

Moreover, the record contains sufficient independent proof to satisfy a far more rigorous corroboration rule than that generally applied in the federal courts. Apart from petitioner's own declarations, there is a direct showing that he arrived at Philadelphia in 1914, that he was not born in

Atlantic City although he never claimed any other American city as the place of his birth, and that he had never applied for naturalization. And one of the elements of the offense, the actual exhibition of the passport, was established by evidence wholly unrelated to petitioner's admissions. Coupled with his repeated declarations and entire course of conduct over more than a score of years, this evidence is plainly sufficient to sustain the conviction.

The quantitative evidence rule in perjury cases is not applicable here, as petitioner contends, since this Court is under no obligation to borrow rules of evidence from perjury and to make them applicable to other offenses specifically created by statute. Even if the quantitative evidence rule were to be applied, there is a clear exception to the rule, recognized by this Court in *United States v. Wood*, 14 Pet. 430, when the falsity of the statements is shown by the previous written statements of the defendant himself. Nor does the evidence in the present case present the logical difficulty of determining which of the conflicting statements is false. The nature of the earlier statements and the circumstances under which they were made, as well as the other corroborative evidence, suffices to establish the falsity of the statements in the passport application that petitioner was a citizen and that he had not resided abroad.

ARGUMENT

I

THE PRESENTATION BY AN ALIEN OF A FRAUDULENTLY OBTAINED UNITED STATES PASSPORT TO OBTAIN ENTRY TO THE UNITED STATES AS AN AMERICAN CITIZEN IS A "USE" WITHIN THE MEANING OF THE STATUTE

Petitioner argues that the statute is inapplicable to the use of the fraudulently obtained United States passport to obtain entry into the United States as an American citizen, even when it is used by an alien who has no right to enter. He contends that such a use is not a "use" of a passport *qua* passport; that Congress in enacting Title IX of the Espionage Act intended to reach the use of fraudulently obtained, forged, altered, or transferred passports in travel abroad, not in entering the United States. We have answered these contentions fully in our brief in *Browder v. United States*, No. 287, present Term, and we do not repeat the arguments here. If, as we contend in the *Browder* case, the statute applies to the use of a fraudulently obtained passport by a citizen to establish his citizenship and right to enter upon returning from abroad, it applies *a fortiori* to the use of such a passport by an alien to effect an illegal entry. Indeed, it surpasses belief that Congress, legislating to protect the integrity of the United States passport, did not intend to reach the

use of a fraudulently obtained passport by an alien to obtain entry to the United States.¹

Petitioner makes one other contention which requires an answer here. He argues that if the word "use" includes the presentation of a fraudulently obtained, forged, altered, or transferred passport to establish the right to enter the United States, the statute is rendered unconstitutional. In support of this contention he urges that Congress could not constitutionally punish the use of an expired passport as a means of identification upon returning to the United States from Canada or Mexico; and that such a use would be criminal under the interpretation for which the Government contends. The argument is, in our opinion, frivolous. In the first place, it rests upon the assumption, sustained by no authority, that the use of expired passports legitimately obtained and held is a use "in violation of the conditions or restrictions therein contained" forbidden by Section 3 (U. S. C., Title 22, Sec. 221)

¹If petitioner had obtained a visa to a foreign passport by fraudulent representations, he would have violated U. S. C., Title 8, Section 220 (Act of May 26, 1924, c. 190, § 22, 43 Stat. 165), and perhaps also U. S. C., Title 22, Sections 223, 227 (Act of May 22, 1918, c. 81, § 1, 40 Stat. 559, extended by Act of March 2, 1921, c. 113, § 1, 41 Stat. 1217). There is no basis for the petitioner's statement (Brief, p. 7) that the criminal provisions of the Act of 1918 are no longer in force. Judge Lewis' observation in *Flora v. Rustad*, 8 F. (2d) 335 (C. C. A. 8th), that it "has never been the policy of this Government to punish criminally aliens who come here in contravention of our immigration laws" was not made with reference to aliens who achieve illegal entry by false or fraudulent papers.

or a use of a "passport validly issued which has become void by the occurrence of any condition therein prescribed invalidating the same" prohibited by Section 4 (U. S. C., Title 22, Sec. 222). As we have said in our brief in *Browder v. United States*, No. 287, present Term (p. 20), it is at least debatable whether these provisions apply to a passport legitimately obtained which is invalidated by the ordinary time limitation. In the second place, we see no basis for the suggestion that Congress could not constitutionally make it a crime to use an expired passport even for this purpose.² Finally, even if such an application of the statute created a constitutional doubt, to be avoided by a narrow interpretation, there is no reason why the same narrow interpretation should be adopted in construing the other provisions of the statute which present no constitutional doubt. Petitioner was not charged with using an expired passport, legitimately obtained, as a means of truthful identification, and would have no standing to challenge the constitutionality of the provisions which he contends prohibit such a use. By the same token he cannot invoke a doubt as to their constitutionality to avoid

² Petitioner relies upon *Stromberg v. California*, 283 U. S. 359, and *De Jonge v. Oregon*, 299 U. S. 353, which presented issues of freedom of speech and assembly, and *Lanzetta v. New Jersey*, 306 U. S. 451, which presented the problem of uncertainty. It is difficult to see what bearing they have upon the power of Congress to prescribe the purposes for which expired passports may be used or to limit their use upon entering the country to the life of the passport.

the application of another section in a manner which creates no constitutional doubt. *Utah Power & Light Company v. Pfof*, 286 U. S. 165, 186.

II

THE EVIDENCE THAT PETITIONER PRESENTED THE PASSPORT TO THE IMMIGRANT INSPECTOR JUSTIFIED SUBMISSION OF THE ISSUE TO THE JURY

Petitioner contends that his motion for a directed verdict should have been granted because the evidence was insufficient to permit the jury to find that he presented the passport to the immigrant inspector. Since the Circuit Court of Appeals sustained the trial court's determination that the evidence was sufficient, we doubt that the adequacy of the evidence will be reviewed by this Court. *Delaney v. United States*, 263 U. S. 586, 589-590. In any event, the evidence was sufficient.

Petitioner arrived at New York on the *S. S. Normandie* on September 30, 1937 (R. 38-39). The manifest contained a "List of United States Citizens" (Ex. 6, R. 211), which noted, among other things, the number of the passport held by each person on the list. Included in the list is "Robert Wiener," the holder of passport No. 332207. This is the number of the passport issued upon the petitioner's application (R. 46; Exs. 1, 22, R. 206, 233). The page of the manifest bears the signature of Immigrant Inspector Faire, who checked all the names on the list (R. 45). Inspector Faire testified as follows (R. 46):

Q. Do you have any independent recollection of the arrival of this particular individual Robert Wiener?

A. No. I don't.

Q. Can you state from looking at the manifest, Mr. Faire, whether or not the passport of the individual Robert Wiener was presented to you?

A. Yes, sir; I can.

Q. On what do you base your statement?

A. The number of the passport, No. 332207, is entered on the manifest and it is my invariable practice when the number of the passport appears on the manifest to ask for that passport and have it shown to me.

Q. * * * You stated that it was your invariable practice to ask for the passport?

A. That is correct.

Q. And you state that it was shown to you?

A. That is correct.

Q. By whom?

A. By the passenger.

Q. In 1937 what was the practice with respect to the returning of passports after you had examined them?

A. The passport was returned to the passenger.

Thus inspector Faire testified that he knew that the passport had been shown to him because it was his invariable practice when a passport number appeared on the manifest to ask for the passport *and have it shown to him*. Nothing that he said on cross-examination or on redirect examination detracted significantly from the force of this unequiv-

ocal testimony. He was asked whether it was essential that a passenger present a passport and said that it was not if he could present other convincing proof that he was an American citizen (R. 48-49). He was asked whether it is customary for American citizens returning from a foreign land to present their passports and replied that it is (R. 49). He was asked whether the typewritten list was already prepared when he got on the ship and answered that it was compiled by the purser (R. 49). He acknowledged that he did not make any writing on the list of names as to what the passengers showed him (R. 49). He explained that his check marks indicate that the passenger was admitted as an American citizen, though not necessarily that a passport had been shown (R. 50).³ He repeated that he could say that a passport was shown because the number appeared on the list (R. 50). He had no occasion to explain again that the reason why he could say this was that when a number appeared it was his invariable practice to ask for the passport and have it shown to him. But that this was the basis of his testimony was made

³ Petitioner argues that this statement was fatal because all the names on this particular list were accompanied by passport numbers and since everyone was admitted as a citizen, the witness either was able to say that everyone showed a passport or else was unable to say with assurance that any particular person did. It seems clear, however, that Inspector Faire was addressing himself to the significance of the check mark in general, not to the inferences which may be drawn as to this particular list.

perfectly clear. There is, therefore, no justification for the petitioner's statement (Brief, p. 22) that the testimony was "that the witness, having no recollection of the incident, supposes that a passport was shown in the particular instance only because there was a number on the list and he had made a check mark against the name." The fundamental point was that his invariable practice permitted him to be certain that he insisted on seeing the passport and must have seen it before he admitted the petitioner as a citizen, as his check indicated he did. That this evidence was sufficient, if believed, to prove that the passport was presented seems to us to be wholly free from doubt.

It may be added that even if the evidence showed no more than the petitioner concedes it does, that the inspector asked for the passport, the jury would have been justified in inferring that the petitioner presented it in response to the request. For it is clear that he had the passport in his possession when the manifest was made up and that it is customary to use passports to establish the right to enter (R. 49). It is hardly to be supposed that when the moment came to establish his right to enter petitioner used some other evidence than the passport to support his claim that he was an American citizen; and the jury could, therefore, properly infer that it was upon the passport that he relied. There is nothing in the law of evidence which forbids a jury to draw an inference which is so highly trustworthy in the light of experience, because it

does not follow *inescapably* from the premises. Nor is there any rule which prohibits a jury from drawing two successive inferences from the evidence, if both are logically and empirically sound. The statement which is sometimes made that an inference may not be built upon an inference must be read as a condemnation of proof which, under the particular circumstances, has insufficient probative force; taken literally it is open to the destructive attack which has been levelled against it on logical grounds. See *Wigmore on Evidence* (3d Ed.) Section 41.

III

THERE WAS SUFFICIENT EVIDENCE TO ESTABLISH THE
FALSITY OF PETITIONER'S STATEMENTS THAT HE WAS
A CITIZEN AND THAT HE HAD NOT RESIDED ABROAD

In the trial court the petitioner challenged the sufficiency of the evidence as to each of the four allegedly false statements made in his application for the passport and requested that each in turn be withdrawn from the jury's consideration (R. 174-179, 180). The court instructed the jury that it might render a verdict of guilty if it found any one of the statements to be false (R. 189, 194). Petitioner did not in the court below, and does not now, contest the adequacy of the proof that petitioner falsely stated that his name was Robert William Weiner and that he was born in Atlantic City, New Jersey, on September 5, 1896 (Brief, pp. 39-40). He does contend, however, that the evidence is in-

sufficient to establish the falsity of the other two statements, that he was a citizen and that he had not resided abroad; and that since the jury may have rested its verdict upon the falsity of any one of the four statements, the judgment must be reversed if the evidence is insufficient as to any of them.

He urges that the evidence of alienage and residence abroad was insufficient because it rests on the defendant's admissions, without adequate corroboration. We contend that the admissions were sufficient, without corroboration, to take the issue to the jury; and that, in any event, the corroborative evidence was adequate.

The evidence established the following admissions by the petitioner of his alienage and residence abroad: (a) his endorsement of the correctness of the information incorporated in the manifest of the *S. S. Haverford* upon its arrival at the port of Philadelphia in 1914, that he was born in Radanjenko, Russia, that he had never before been in the United States, and that he was a citizen or subject of Russia (R. 85-86, 89; Ex. 19, R. 229); (b) his draft registration card and questionnaire, containing declarations made by him when claiming exemption as an alien in 1917 to the effect that he was born in Russia, that he was not a citizen of the United States, that he had arrived in this country in 1914 aboard the *S. S. Haverford* (R. 93-96; Ex. 21, R. 232); and his declaration in his application for a reentry permit in 1932 (an application which

aliens alone are required to make), acknowledging his birth in Russia, and his arrival at Philadelphia aboard the S. S. *Haverford* in 1914 (R. 73-75; Ex. 13, R. 220).

A. THE PETITIONER'S ADMISSIONS OF 1914, 1917, AND 1932, ARE SUFFICIENT, STANDING ALONE, TO SUSTAIN THE CONVICTION

The traditional rule barring convictions in the absence of corroboration of the petitioner's own statements is inapplicable to declarations made long before the alleged crime, without reference to a charge of crime, and under circumstances which exclude the hypothesis of improper influence.

At the outset, the distinction between confessions and admissions must be noted. "While 'confession' is frequently applied as a general term to any admission made by one accused of crime, the usage is confusing and indeed, misleading. Properly used, 'admission' is applied to statements of independent relevant facts whether in civil or criminal cases. Confession is a term which commonly is, and always should be, reserved to designate an acknowledgment of guilt, of criminal liability, or of such facts as, unless justified, directly and necessarily imply it." (2 Chamberlayne, *Modern Law of Evidence*, § 1476). Cf. *Mason v. United States*, 244 U. S. 362.

It is the Government's contention that independent evidence is required only in the case of confes-

sions, and of admissions made after the event and in the context of conversations, interviews, and proceedings relating to the offense itself. The theory of this position squares with the purposes of the rule requiring corroboration. For the object of that rule, in the words of the Circuit Court of Appeals, in the instant case is "protection against the risks of an untrue confession, coerced or psychopathic" (R. 259). The declarations by the petitioner, relied upon by the Government, were made on occasions long before the date of the offenses alleged and in connection with proceedings wholly unrelated to those which formed the basis of this indictment. They were made under circumstances which give no cause for anxiety that they were involuntary or psychopathic.

No decision of this Court holds that the rule requiring corroboration is applicable to admissions, as distinct from confessions, and one decision indicates that it is not. In *United States v. Miles*, 103 U. S. 304, the defendant was indicted for polygamy, it being charged that he had married one Emily Spencer and that later on the same day, Emily Spencer then being alive and his lawful wife, he had married one Carolyn Owens. The defendant and the two women were Mormons and all marriages in the Mormon church were secret. Consequently, the Government sought to prove the polygamous marriage to Carolyn Owens by introducing the declarations of the defendant made at a wedding supper on the evening of the day in

question in which he had stated that Emily Spencer was his first wife. At the trial the defendant admitted that he had married Carolyn Owens, and the only disputed question was whether he had previously married Emily Spencer. The trial court charged: "If you find, from the facts and circumstances proven in this case, and from the admissions of the defendant, *or from either*, that the defendant Miles married Emily Spencer, and while she was yet living and his wife he married Carolyn Owens, as charged in the indictment, your verdict should be, guilty" [italics ours]. The defendant was convicted. The judgment was reversed by this Court on the ground that the testimony of Carolyn Owens concerning the previous marriage to Emily Spencer should have been excluded. However, the Court held that the evidence of the defendant's declarations at the wedding supper was properly admitted, and the charge that these declarations standing alone were sufficient for conviction was specifically upheld (103 U. S. at 312). The decision in the *Miles* case is controlling here, since the defendant's admissions of a previous marriage in that case are strictly analogous to petitioner's admissions of alienage and residence abroad in this case.

The distinction between confessions and admissions for purposes of the rule requiring corroboration has been drawn by several commentators. Following the definition of confessions and admissions referred to above (p. 22) Chamberlayne continues: "An 'admission' as thus defined, the statement by

a party of the existence of a relevant fact, is treated by the rules of procedure in precisely the same way whether it is offered in criminal or civil cases. It is the same thing. It has precisely, under proper circumstances, the same force and effect as evidence." (2 Chamberlayne, *Modern Law of Evidence*, § 1476. See also *Wigmore on Evidence* (3d ed.) §§ 2074 (a), 821, 2087 (a)). And it is a matter of universal agreement that in civil cases there is no general rule that the admissions of a party are insufficient to support a verdict without corroborating evidence. *Wigmore on Evidence* (3d ed.) § 2075. It is especially significant that Greenleaf, credited by ~~Wigmore~~ as being the author of the American rule requiring the corroboration of confessions (*Wigmore on Evidence* (3d ed.), § 2071), especially excepted admissions from the impact of the doctrine:

The term "confession," as indicating a statement subjected to particular rules for its use in criminal cases, seems in strictness to include only what in common usage the term implies, namely, a direct assertion by the accused person of the doing of the act charged as a crime. It is for this sort of statement that the particular ensuing rules of caution and limitation are intended—the rule requiring some sort of corroboration, the rule requiring freedom from the inducement of hope or fear, and the like. It would seem to follow that these limiting rules about confessions do not apply to conduct or statements of the accused, when offered

(in an admission to)

Wigmore

against him, other than those of the above sort * * * [They do not] apply to admissions of incidental or evidential circumstances which may be used against the accused just as the statements of any party, inconsistent with his present contention, may be used against him. * * * Nevertheless, statements of these two sorts [including admissions], though apparently never deliberately asserted by any Court to come within the rules of confessions, are by some Courts not uncommonly treated as though the limiting rules about confessions were applicable. (Greenleaf, *Evidence* (16th ed.) § 213.) Cf. Jones, *Evidence* (2d ed.) § 295.

As opposed to these authorities, there appear to be but three decisions by the Federal courts requiring that admissions made before the event be corroborated in order to sustain a conviction. *Gordnier v. United States*, 261 Fed. 910 (C. C. A. 9th); *Duncan v. United States*, 68 F. (2d) 136 (C. C. A. 9th), defendant's petition for certiorari denied, 292 U. S. 646; *Gulotta v. United States*, 113 F. (2d) 683 (C. C. A. 8th). The authority of the *Gordnier* case, at least, is questionable in view of the misapprehension of the court in that case concerning the nature of admissions; it denied that declarations by the defendant, similar to those involved in the instant case, were admissions, because they were not "against interest at the time when they were made" (261 Fed. at 912). But there is no doubt that admissions, as distinguished from

declarations against interest, may be received in evidence no matter how they may have affected the fortunes of the defendant at the time they were made. *Wigmore on Evidence* (3d ed.) §§ 1048, 1049.

Petitioner cites the following cases (Brief, p. 34) to support the proposition that “* * * statements made before the commission of the crime have been held insufficient in the absence of corroboration of the *corpus delicti* * * *” (p. 20): *People v. Lambert*, 5 Mich. 349; *People v. Isham*, 109 Mich. 72; *Hiler v. People*, 156 Ill. 511; *Green v. State*, 21 Fla. 403; *People v. Simonsen*, 107 Cal. 345. It is enough to say that the opinion in the *Simonsen* case does not reveal whether the statements were made before or after the event, and that the remaining four cases appear to reflect a minority view as to the evidence required in prosecutions for bigamy and adultery. *Wigmore on Evidence* (3d ed.) § 2086 (b) and (c).

There is thus no compelling authority in support of the requirement of corroboration as applied to admissions of the sort which are involved in the present case. On the other hand, the requirement of independent proof has been widely attacked and rejected, even as applied to confessions. English commentators have long been at odds as to the inherent worth of confessions as evidence, and in a widely quoted passage Blackstone characterizes them as “the weakest and most suspicious of all testimony,” because, as he observed, they are fre-

quently obtained by "artifice, false hopes, promises of favor, or menaces; seldom remembered accurately, or reported with due precision; and incapable in their nature of being disproved by other negative evidence." 4 *Blackstone's Commentaries* 357.⁴ However, while no precise rule appears to have been formulated, it is the general view that in England even confessions, without corroboration, may provide a basis for conviction of all but a few crimes. See Chitty's comment appended to the passage from Blackstone just quoted, in 4 *Blackstone's Commentaries* 357 (ed. Lewis, 1900); 3 Russell, *Law of Crimes* (7th Eng., 1st Can. ed.) 2156 (listing bigamy, offenses involving title to property, and homicide, as crimes requiring corroboration); 9 Halsbury, *Laws of England* (2d ed.) 207, 183; *Wigmore on Evidence* (3d ed.) § 2070; *United States v. Williams*, 1 Cliff. 5, 25. The rule that there must be corroboration has been explicitly rejected in Massachusetts. *Commonwealth v. Sanborn*, 116 Mass. 61; *Commonwealth v. Killion*, 194 Mass. 153. And it has been roundly criticized by other courts. L. Hand, J., in *Daeche v. United States*, 250 Fed. 566, 571 (C. C. A. 2d); Otis, J., in

⁴ This enunciation of the considerations which are involved in receiving *confessions* in evidence strikingly demonstrates how devoid of such questionable attributes are *admissions* like those of the petitioner in the instant case. They were freely made, without reference to criminal proceedings at any stage; the words were recorded when uttered; the conduct is not susceptible of distortion; and the propositions involved could be disputed by any evidence to the contrary which petitioner could produce.

United States v. Gulotta, 29 F. Supp. 947 (W. D. Mo.). It ought not to be extended by this Court to situations where, as we have said, the justification for the rule does not obtain.

The rule is universally observed that statements of the accused the making of which is coerced or induced by promises of favor may not even be received in evidence. Its vigor was recently demonstrated by this court in *Chambers v. Florida*, 309 U. S. 227; and it has been applied to admissions made after a charge of crime as well as to confessions. *Bram v. United States*, 168 U. S. 532. By the operation of this rule any statements by the accused whose probative force may be lessened by the presence of a motive to obscure or to hide the truth are excluded from the consideration of the jury and the temptation to extort confessions is effectively removed. An additional requirement of corroboration is, therefore, hardly necessary for the effective protection of innocence.

In *Funk v. United States*, 290 U. S. 371, 381, this Court forcefully said that the "fundamental basis upon which all rules of evidence must rest—if they are to rest upon reason—is their adaptation to the successful development of truth." Judged by this standard, a rule which would deny the sufficiency of all admissions is shown to be unreasonable by the evidence in the present case. Petitioner's entry at the port of Philadelphia in 1914 as an alien, his reliance upon alienage for exemption

from the draft in 1917, his response when seeking reentry in 1932 to the natural impulse of an alien to make an application required only of aliens, all have a circumstantial trustworthiness which decisively demonstrates that his explicit declarations of alienage and of birth and residence abroad were not the products of a romantic impulse to pose as the subject of a foreign state. The petitioner's express language together with his behavior over a period of twenty-two years leave room for no substantial doubt that he was an alien and that he had been born and had resided in Russia.

B. IF CORROBORATION IS REQUIRED, THERE WAS SUFFICIENT INDEPENDENT PROOF

1. *There was sufficient independent evidence of the falsity of the statements*

The manifest of the S. S. *Haverford* has double probative significance. It represents a statement of facts, verified by the petitioner on his arrival at Philadelphia (R. 85, 89). But it is admissible also as a record of the petitioner's arrival at that port in 1914. See *McInerny v. United States*, 143 Fed. 729, 736, 738 (C. C. A. 1st); *Sullivan v. United States*, 161 Fed. 253 (C. C. A. 1st). The identity of the petitioner as the person named in the manifest is not disputed. For this purpose the manifest is independent evidence which fits the petitioner's own account of his personal history. Its function is corroborative in the most significant sense, since the inferences to be drawn from it exactly coincide with

the inferences raised by the petitioner's own declarations.

The forgery of the Atlantic City birth record likewise has two-fold evidential force. Petitioner's reliance upon it when applying for the passport in 1935, constitutes an admission on his part by conduct that he thought himself unable to present genuine proof of birth anywhere in the United States. But the forged entry in the birth records of Atlantic City, when taken with one additional item of evidence, enjoys another attribute as proof. The additional item of evidence is the testimony (R. 28-31) of the Assistant Registrar of the New Jersey Department of Health that, except for the forgery there was no other entry of petitioner's birth in Atlantic City or Atlantic County on the date given or on any date during the years just preceding and following. Thus there was independent proof that petitioner was not born in Atlantic City, New Jersey, where he claimed to have been born on the single occasion when he said that he was a native of this country rather than of Russia. If the petitioner were in truth a native citizen of the United States, and at no time has he claimed to be a naturalized citizen, it was open to him when applying for a passport to produce his records of birth from the American city in which he was actually born, or to explain his inability to do so (R. 21). But he chose to claim as the city of his birth one in which he was not born, as this evidence, wholly independent of his admissions,

conclusively demonstrates. Like the manifest of the *S. S. Haverford*, the forgery and the testimony of the State Health Officer also fulfills the function of corroboration in its most significant sense. That is to say, the inferences to be drawn from this independent proof nicely coincide with the petitioner's repeated previous declarations respecting his birth abroad.

It can hardly be seriously asserted that the Government is obligated to make an affirmative showing of the absence of any genuine record of the petitioner's birth in any city, town, or village in the United States. Nor can the Government reasonably be required to produce the record of petitioner's birth in Radanjenko, U. S. S. R., the town which the petitioner had consistently acknowledged to be the place of his nativity. In the light of the always enormous difficulties of such proof (see *Duncan v. United States*, 68 F. (2d) 136 (C. C. A. 9th), certiorari denied, 292 U. S. 646), and the state of war existing at the time of the institution of this prosecution (R. 2), any such requirement would gravely impede intelligent and effective enforcement of the laws relating to persons of foreign birth and citizenship at a moment when wise administration of these very laws is of momentous importance.

Finally, and perhaps of most significance, there is the direct and positive testimony introduced by the Government to prove that at no time has the petitioner made any application for naturalization

(R. 72-73). This evidence is wholly independent of petitioner's admissions and it corroborates them most strongly. For if it be conceded, as petitioner's admissions and the forged entry of birth and the testimony as to the absence of any genuine entry of birth in Atlantic City combine to demonstrate, that petitioner was not born in this country, his claim to citizenship could only rest upon a showing that he had been naturalized.

These items of independent proof would be sufficient to meet highly exacting requirements of corroboration, where such requirements assumed to be applicable to defendant's admissions here. The Federal courts, however, have wisely and generally conceded that the amount of independent proof required to satisfy the corroboration rule, even as to confessions, is slight. *Daeché v. United States*, 250 Fed. 566 (C. C. A. 2d); *Mangum v. United States*, 289 Fed. 213 (C. C. A. 9th); *Pearlman v. United States*, 10 F. (2d) 460 (C. C. A. 9th); *Forlini v. United States*, 12 F. (2d) 631 (C. C. A. 2d); *Wynkoop v. United States*, 22 F. (2d) 799 (C. C. A. 9th); *Jordan v. United States*, 60 F. (2d) 4 (C. C. A. 4th), certiorari denied, 287 U. S. 633; *Ryan v. United States*, 99 F. (2d) 864 (C. C. A. 8th), certiorari denied, 306 U. S. 635, 668; *Gregg v. United States*, 113 F. (2d) 687 (C. C. A. 8th). Moreover, at least one of the three Federal cases in which it has been held that admissions made before the event require corroboration (*Duncan v. United States, supra*) is distinguishable on the

ground that there was no showing that naturalization had not been obtained. The petitioner urges that the *Duncan* case cannot be distinguished on this ground, because, as he argues, there was proof in that case of foreign birth. But the Court held that the basis laid for the admission of a Roumanian birth certificate in the defendant's name was inadequate, although it also ruled that the objection to its admission was improperly raised. We think it clear that the Court thereupon proceeded to treat the defendant's additional objections on the assumption (p. 142) that the birth certificate was *not* properly in evidence. It was on this assumption that the Court held that the possibility that the defendant had become a citizen had not been negatived by the Government (p. 143).

As to the petitioner's admissions that he had resided abroad, it is enough to point again to the forged entry in the Atlantic City birth records, the absence of any genuine entry in those records, and the record of arrival in 1914 afforded by the ship's manifest, which amply corroborate his own account of his beginnings and his odyssey. They "fortify" his repeated declarations that he was born in Russia and resided there until he entered this country in 1914. See L. Hand, J., in *Daeche v. United States*, *supra*, 250 Fed. at 571, 572.

To deny the sufficiency of the corroborative evidence discussed above would, it seems clear, convert a requirement that admissions be corroborated

into a rule that admissions may *only* serve to corroborate other proof of the crime charged.

2. *There was independent evidence of petitioner's use of the passport*

The corroboration rule is traditionally cast in terms of a requirement of independent evidence of the *corpus delicti*. While the definition of *corpus delicti* is volatile (*Wigmore on Evidence* (3d ed.) § 2072) and the courts have differed markedly as to its content, there is no general requirement that there be independent evidence as to every element of the *corpus delicti*. The case of *Forte v. United States*, 94 F. (2d) 236 (App. D. C.) in which this harsh rule was enunciated was specifically disapproved by the Circuit Court of Appeals in the instant case (R. 259) and appears to represent what is decidedly a minority view. That the corroboration need not blanket all the elements of the crime is indicated by *People v. Lytton*, 257 N. Y. 310, where the defendant, charged with homicide while in the commission of a robbery, confessed to the police that he had engaged in the robbery. There was independent proof that the homicide had occurred at the same time. The trial court charged that independent evidence of the robbery was not essential to a conviction of murder. The Court of Appeals approved the charge of the trial court (pp. 313-316), holding, in an opinion by Judge Cardozo, that the independent proof required to supplement a confession by Section 395 of the New York

Code of Criminal Procedure need relate only to the homicide. Later the Court of Appeals reached a similar result in affirming a judgment of conviction where the defendant was charged with a second offense of operating a motor vehicle while in an intoxicated condition, and the only evidence of a previous offense was his own acknowledgment of a prior conviction. *People v. Warner*, 152 Misc. 607, 274 N. Y. S. 689 (County Court), affirmed, 244 App. Div. 833, 279 N. Y. S. 639 (3d Dep't), affirmed, 269 N. Y. 597.

Thus, even if the *corpus delicti* includes the falsity of the statements by which the passport was obtained, the independent evidence that the passport was used proves one element of the crime and this should be sufficient.

C. THE QUANTITATIVE EVIDENCE RULE IN PERJURY CASES IS INAPPLICABLE AND IN ANY EVENT THE EVIDENCE WOULD SATISFY THE REQUIREMENTS OF THAT RULE

Perjury, like treason, enjoyed a unique status among common law crimes. It has been suggested that the origin and development of the rule of evidence peculiar to it is to be explained by the historical vagaries of the court system in England.⁵ (*Wigmore on Evidence* (3d ed.) § 2040), and the doctrine has been the target of pointed and fre-

⁵ For an expression of the view that the rules of evidence are "less hampered by history than some parts of the substantive law, see Holmes, J., dissenting, in *Donnelly v. United States*, 228 U. S. 243, 277-278.

quent criticism in recent years. See *Goins v. United States*, 99 F. (2d) 147, 149, 150 (C. C. A. 4th), affirmed, 306 U. S. 622, 623; *Wigmore on Evidence* (3d ed.) [§ 2041; Report of the New York Law Revision Commission (Legislative Documents 1935, No. 60) p. 322; McClintock, *What Happens to Perjurors* (1940) 24 Minn. L. Rev. 727. Yet we do not deny that the rule that the falsity of the defendant's statement cannot ordinarily be proved by the uncorroborated testimony of a single witness is now almost universally accepted: There is no occasion in the present case to argue that the rule should be discarded because the reason for it has disappeared. Cf. *Funk v. United States*, 290 U. S. 371; *Goins v. United States*, 306 U. S. 622, 623, *supra*. In the first place, the petitioner is not here charged with the familiar common law offense of perjury, as now embodied in U. S. C., Title 18, Section 231. The crime with which he is charged was specifically created by statute (U. S. C., Title 22, Section 220), and this Court is under no obligation to borrow rules of evidence from perjury or other crimes and to make them applicable here.* Petitioner urges, nevertheless, that a marked similarity exists between the offense made punishable by U. S. C., Title 22, Section 220, and U. S. C., Title 18,

* For instances of a refusal to apply the rules of perjury cases to prosecutions for the statutory offense of swearing falsely in bankruptcy proceedings, see *Kahn v. United States*, 214 Fed. 54 (C. C. A. 2d); *Schonfeld v. United States*, 277 Fed. 934 (C. C. A. 2d).

Section 231. On the assumption, therefore, that the amalgamation of the two offenses commends itself for purposes of testing the sufficiency of the evidence, it may be well to examine the traditional requirement that there be more than the uncorroborated testimony of a single witness in perjury trials.

While this rule is widely observed both in England and in the United States, a sensible and well defined exception to it is also clearly recognized. And that exception is plainly controlling in the present case. In *United States v. Wood*, 14 Pet. 430, a prosecution for perjury, this Court examined the application of the so-called "two-witness rule" to a situation in which a defendant's sworn statement was inconsistent with repeated prior declarations in writing emanating from the defendant himself. Following an examination of the English authorities the Court held that such declarations were sufficient to sustain a conviction and defined a category of perjury cases in which neither the testimony of two witnesses nor the corroborated testimony of a single witness is essential (p. 441):

We thus see that this rule, in its proper application, has been expanded beyond its literal terms, as cases have occurred in which proofs have been offered equivalent to the end intended to be accomplished by the rule. In what cases, then, will the rule not apply? Or in what cases may a living witness to the *corpus delicti* of a defendant, be dispensed with, and documentary or written testimony

be relied upon to convict? We answer, to all such where a person is charged with a perjury, directly disproved by documentary or written testimony springing from himself, with circumstances showing the corrupt intent. In cases where the perjury charged is contradicted by a public record, proved to have been well known to the defendant when he took the oath; the oath only being proved to have been taken. In cases where a party is charged with taking an oath, contrary to what he must necessarily have known to be the truth, and the false swearing can be proved by his own letters, relating to the fact sworn to; or by other written testimony, existing and being found in the possession of a defendant, and which has been treated by him as containing the evidence of the fact recited in it.

The admissions in the *Wood* case consisted of letters written by the defendant; the admissions in the instant case consist of acts, of the defendant's verification of the declarations in the ship's manifest, and of the declarations made in the defendant's own handwriting in the cases of the draft papers and the application for the reentry permit. That an exact parallel exists between the two kinds of evidence is patent.

That there is no logical objection to the conviction of the defendant upon the basis of his own inconsistent statements is abundantly clear. While neither the principle of contradiction nor that of inconsistency identifies which of the inconsistent or

contradictory statements is true and which is false,⁷ the record in the instant case presents no arid logical problem. The abundant evidence of the circumstances surrounding the making of the earlier statements as well as the corroborative evidence discussed above leaves no doubt of the truth of the earlier statements and the falsity of those made in the passport application. The evidence of accompanying circumstances provides the key to the resolution of the logical difficulty, when, as in the present case, it identifies the conflicting statement which is false.⁸ See Pollock, C. B. in *Reg. v. Hook, Dears. & B.* 606, 8 Cox Crim. Cas. 5; ⁸ cf. *People v. Doody*, 172 N. Y. 165. Such evidence suffices as a matter of "experience, logic, and common sense" (see Holmes, J., in *Donnelly v. United States*, 228

⁷ Cf. N. J. Rev. Stat. (1937), tit. 2, c. 157 (5), and N. Y. Pen. Code, §§ 1627, 1627a, permitting indictments in the case of sworn contradictory statements without assigning falsity to either, and permitting convictions where nothing further is proved.

⁸ The nicety of this question has provoked a sprightly dispute in the English cases. See *King v. Harris*, 5 B. & Ald. 926; *Rex v. Knill*, and the anonymous case decided by Yates, J., at the Lancaster summer Assizes in 1764, both reported in notes to the *Harris* case on pages 929 and 937; *Reg. v. Wheatland*, 8 Carr. & Payne 238; and *Rex v. Mayhew*, 6 Carr. & Payne 415. The opinion of Pollock, C. B., in *Reg. v. Hook*, suggests that the matter in England has finally been settled in favor of the sufficiency of contradictory statements to sustain the conviction of perjury.

U. S. 243, 277); that it also suffices as a matter of law is the plain import of the decision of this Court in *United States v. Wood*, 14 Pet. 430, *supra*. See also *Sullivan v. United States*, 161 Fed. 253, 255, 256 (C. C. A. 1st); *Gordon v. United States*, 5 F. (2d) 943, 945 (C. C. A. 8th); *Jacobs v. United States*, 31 F. (2d) 568 (C. C. A. 6th), certiorari denied, 279 U. S. 869. The doctrine of the *Wood* case was reaffirmed in *Hammer v. United States*, 271 U. S. 620, 627, where it was said in an opinion by Mr. Justice Butler:

The question is not the same as that arising in a prosecution for perjury where the defendant's own acts, business transactions, documents, or correspondence are brought forward to establish the falsity of his oath alleged as perjury. That, in some cases, the falsity charge may be shown by other than the testimony of living witnesses is forcibly shown by the opinion of this Court in *United States v. Wood*, 14 Pet. 430, 443. That case shows that the rule which forbids conviction on the unsupported testimony of one witness as to falsity of the matter alleged as perjury does not relate to the kind or amount of other evidence required to establish that fact. Undoubtedly in some cases documents emanating from the accused and the attending circumstances may constitute better evidence of such falsity than any amount of oral testimony.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the Circuit Court of Appeals should be affirmed.

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✓ JOHN T. CAHILL,
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HERBERT WECHSLER,
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JANUARY 1941.

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APPENDIX

Title IX of the Espionage Act of 1917, 40 Stat. 227 (U. S. C., Title 22, Sections 213, 220, 221, 222), provides:

SECTION 1. Before a passport is issued to any person by or under authority of the United States such person shall subscribe to and submit a written application duly verified by his oath before a person authorized and empowered to administer oaths, which said application shall contain a true recital of each and every matter of fact which may be required by law or by any rules authorized by law to be stated as a prerequisite to the issuance of any such passport. Clerks of United States courts, agents of the Department of State, or other Federal officials authorized, or who may be authorized, to take passport applications and administer oaths thereon, shall collect, for all services in connection therewith, a fee of \$1, and no more, in lieu of all fees prescribed by any statute of the United States, whether the application is executed singly, in duplicate, or in triplicate.

SEC. 2. Whoever shall willfully and knowingly make any false statement in an application for passport with intent to induce or secure the issuance of a passport under the authority of the United States, either for his own use or the use of another, contrary to the laws regulating the issuance of passports or the rules prescribed pursuant to such laws, or whoever shall willfully and knowingly use or attempt to use, or furnish to another for use, any passport the issue of which was secured in any way by reason of

any false statement, shall be fined not more than \$2,000 or imprisoned not more than five years¹ or both.

SEC. 3. Whoever shall willfully and knowingly use, or attempt to use, any passport issued or designed for the use of another than himself, or whoever shall willfully and knowingly use or attempt to use any passport in violation of the conditions or restrictions therein contained, or of the rules prescribed pursuant to the laws regulating the issuance of passports, which said rules shall be printed on the passport; or whoever shall willfully and knowingly furnish, dispose of, or deliver a passport to any person, for use by another than the person for whose use it was originally issued and designed, shall be fined not more than \$2,000 or imprisoned not more than five years, or both.

SEC. 4. Whoever shall falsely make, forge, counterfeit, mutilate, or alter, or cause or procure to be falsely made, forged, counterfeited, mutilated, or altered any passport or instrument purporting to be a passport with intent to use the same, or with intent that the same may be used by another; or whoever shall willfully or knowingly use, or attempt to use, or furnish to another for use any such false, forged, counterfeited, mutilated, or altered passport or instrument purporting to be a passport, or any passport validly issued which has become void by the occurrence of any condition therein prescribed invalidating the same, shall be fined not more than \$2,000 or imprisoned not more than five years, or both.

¹ By the Act of March 28, 1940, c. 72, 54 Stat. 80, the maximum term of imprisonment under this and the succeeding sections was increased to ten years.

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SUPREME COURT OF THE UNITED STATES.

No. 338.—OCTOBER TERM, 1940.

Welwel Warszower, alias "Robert William Wiener," etc., Petitioner, vs. The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.
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[February 17, 1941.]

Mr. Justice REED delivered the opinion of the Court.

This case is similar to *Browder v. United States*, decided today. This petitioner also was indicted for the use of a passport for the purpose of entering the United States, which passport had been secured by false statements in the application for its issue. We granted certiorari because of the contention that this use of the passport was not prohibited by section 2, Title IX of the Act of June 15, 1917, and because of a conflict on a rule of evidence, referred to by the Circuit Court of Appeals.

The false statements charged were with respect to petitioner's name, citizenship, place of birth and residence abroad and the use relied upon was the presentation of the passport to an immigration inspector. A jury convicted petitioner, a sentence of two years was imposed and that judgment was affirmed by the Circuit Court of Appeals.¹

As grounds for reversal petitioner urges (1) that the presentation of a wrongfully held passport to an immigration officer upon landing is not a use within the statute; (2) that the evidence of the use was insufficient to justify the submission of the case to the jury; and (3) that conviction was obtained by the use of admissions before the crime, without corroboration, to establish necessary elements of the charge.

Nothing need be added to the discussion in the *Browder* case of the illegality of this use. There are no marks of differentiation.

Proof of Presentation.—Petitioner's argument that the proof of presentation of the passport was insufficient rests upon the testimony of the inspector, which was based on the manifest of United

¹ 113 F. (2d) 100.

States citizens arriving on the *S.S. Normandie* on September 30, 1937. The manifest contains a list of names, accompanied by passport numbers and other information. Next to each name appears a check mark by the inspector. The list includes "Robert Wiener," the holder of passport No. 332207, which is the passport issued to petitioner. The inspector testified that he had no independent recollection of the arrival of this Robert Wiener, but that from looking at the manifest he could say that the passport had been presented to him, because "it is my invariable practice when the number of the passport appears on the manifest to ask for that passport and have it shown to me . . . by the passenger." On cross examination the inspector stated that he himself did not make any writing on the manifest as to what the people showed him. This colloquy then occurred:

"The Court: . . . do you make any entry on the manifest when a man identifies himself as an American citizen?

The Witness: The whole manifest is of American citizens.

The Court: And when the man presented his passport what did you do?

The Witness: That check mark shows he was admitted as a United States citizen.

The Court: On a passport?

The Witness: Not necessarily.

The Court: Can you tell us whether he had a passport?

The Witness: From the fact the number of the passport appears there.

Q. And you checked—

Mr. Fowler: That is objected to.

Q. Did you check the information on the manifest with information in the passport?

A. That is correct."

The petitioner asks reversal because of the answer "Not necessarily," contending this shows that the check mark did not inescapably indicate the presentation of a passport. The Government argues that the check mark was intended merely to show admission as a citizen and that the language does not nullify or indeed impugn the direct assertions of the inspector. We are clear that this testimony as a whole justified the submission to the jury at any rate and its conclusion that petitioner actually used his passport in securing admission to this country.

Corroboration of Admissions.—The prosecution had the burden of proving that the passport was obtained by the use of false state-

ments. As the trial court instructed the jury it might convict if any one of the statements charged in the indictment to be false was found false, it is necessary before affirmance is justified to decide whether there was adequate evidence to support the charge of falsity as to each of the statements. Petitioner contends that as to the allegedly false statements of American citizenship and no prior residence outside the United States, there was no proof of falsity except admissions to the contrary made by petitioner prior to the use of the passport. Such admissions, it is urged, require corroboration. This argument is drawn from the requirement of corroboration as to confessions after the crime.² As a corollary, it is said that the corroboration must reach to each element of the corpus delicti.³

To establish that petitioner was not a citizen of the United States and that he had resided abroad, the Government relied on the following proof: The manifest of alien passengers of the *S.S. Haverford*, which arrived at Philadelphia on March 27, 1914, stated that Welwel Warszower, age 21, was a citizen or subject of Russia, whose last permanent residence was in Viholsk, Russia, where his father lived; that he had never been in the United States before; and that he had been born in Radajenko, Russia. Although the officer who had examined Warszower on this occasion was dead, the boarding officer testified it was the practice to check all answers on the manifest with the alien personally before allowing him to enter. Three years later, on June 5, 1917, petitioner registered for the draft under the name "William Weiner"; he stated he was an alien born in Russia on September 5, 1893, and a citizen or subject of Russia. Petitioner furnished the same information in a draft questionnaire returned on December 31, 1917, where he also stated that he spoke Russian, that he arrived in this country at Philadelphia on March 28, 1914, on the *S.S. Haverford*, that his parents had not been naturalized, that he had not taken out first papers, and that he was willing to return to Russia and enter its military service. In 1932, preparatory to traveling abroad, petitioner applied for a reentry permit, which is required only of aliens. To

² Wharton, Criminal Law (12th Ed.) §§ 357, 359; *Daeché v. United States*, 250 Fed. 566; Wigmore, Evidence (3rd Ed.) §§ 2070-71; Chamberlayne, Modern Law of Evidence § 1598; Underhill, Criminal Evidence (4th Ed.) p. 42.

³ Cf. *Forte v. United States*, 94 F. (2d) 236.

support his application he showed the inspection card issued to him in 1914 upon his arrival in Philadelphia, and stated that he was born on September 5, 1893, at Kiev, Russia, which was his last permanent residence before his arrival in Philadelphia. The Government also showed that petitioner had never applied for naturalization under his own name, or the names "Weiner" or "Wiener", which he on occasion used. In his 1936 application for a passport in the name of Robert William Wiener, petitioner submitted a certified transcript of an entry in the Atlantic City birth records that a person of that name was born there September 5, 1896, but at the trial the Government proved the entry a forgery.

The rule requiring corroboration of confessions protects the administration of the criminal law against errors in convictions based upon untrue confessions alone. Where the inconsistent statement was made prior to the crime this danger does not exist.⁴ Therefore we are of the view that such admissions do not need to be corroborated. They contain none of the inherent weaknesses of confessions or admissions after the fact. Cases in the circuits are cited by petitioner to the contrary. In *Gulotta v. United States*,⁵ the decision turned on the similarity of confessions and admissions rather than upon any differences between admissions before and after the fact. In *Duncan v. United States*⁶ and in *Gordnier v. United States*⁷ the conclusion was reached without any comment upon this difference. Our consideration of the effect of admissions prior to the crime leads us to the other conclusion.⁸

The law requires that a jury be convinced beyond a reasonable doubt of the defendant's guilt. An uncorroborated confession or evidence of perjury, given by one witness only,⁹ does not as a matter of law establish beyond a reasonable doubt the commission of a crime but these are exceptions to the normal requirement that disputed questions of fact are to be submitted to the jury under appropriate instructions. In this case the earlier statements of birth and therefore necessarily of residence outside of the United

⁴ Wigmore, *supra*.

⁵ 113 F. (2d) 683.

⁶ 68 F. (2d) 136.

⁷ 261 Fed. 910.

⁸ Cf. *Miles v. United States*, 103 U. S. 304.

⁹ *Phair v. United States*, 60 F. (2d) 953. Cf. *United States v. Harris*, No. 52 this Term, decided December 9, 1940.

States, if believed by the jury, prove the falsity of the statements to the contrary in the application. Where the crime charged is a false statement and where it finds its only proof in admissions to the contrary prior to the act set out in the indictment, it may be unlikely that a jury will conclude that the falsity of the later statement is proven beyond a reasonable doubt but such evidence justifies submission of the question to them.

In this present case there was other evidence of the falsity of the disputed statements in the application. The manifest of the *S.S. Haverford* showed petitioner's arrival and classification as an alien at Philadelphia in 1914. The forged birth certificate adds to the proof of foreign birth by showing an effort to establish American nativity by false means and the Government's proof of the absence of any attempt at naturalization supports the allegation of false statement as to citizenship.

Affirmed.

Mr. Justice MURPHY took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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